SUPREME COURT, U. S.

SEP 20 1961

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 426

KONINKLIJKE LUCHTVAART MAATSCHAPPIJ N.V. KLM ROYAL DUTCH AIRLINES HOLLAND and SOCIETE ANONYME BELGE D'EXPLOITATION DE LA NAVIGATION AERIENNE,

Petitioners,

—against—

GERTRUDE OWEN TULLER, individually and as Executrix under the Will of William Gordon Tuller, deceased, KATHERYN L. TULLER, a minor by GERTRUDE OWEN TULLER, her mother and next friend, and JEAN E. TULLER, a minor by GERTRUDE OWEN TULLER, her mother and next friend,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The above-named petitioners respectfully pray for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered herein June 23, 1961.

affirming the judgment of the United States District Court for the District of Columbia entered on January 12, 1960.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Opinions Below

Following the rendition of the jury's verdict defendants moved for judgment notwithstanding the verdict and in the alternative for a new trial. This motion was overruled without opinion by the district court on February 8, 1960. The opinion of the Court of Appeals affirming the judgment of the district court is not yet officially reported but a copy thereof is printed in the Appendix infra, pages 31 to 52.

Petitioners seek a review of the determination of the United States Court of Appeals for the District of Columbia Circuit affirming a judgment of the United States District Court for the District of Columbia awarding respondents the sum of $350,000 for the death of respondents' decedent as an aftermath of an airplane accident in the estuary of the Shannon River in Ireland on September 5, 1954. The flight was "international transportation" within the terms of the Warsaw Convention, an international treaty, to which the United States has adhered, and therefore the action was subject to the limitation provisions contained in Article 22 thereof which limits recovery to $8300 in the absence of wilful misconduct.

The Questions Presented

1. Whether the lower courts in the case at bar have so flagrantly disregarded the rules of law governing limitation of liability and wilful misconduct as defined by the Warsaw Convention as to nullify and destroy the Convention, thereby requiring this Court's power of supervision.

2. Whether in equating "wilful misconduct" with "the negligence in question", the Court of Appeals has totally disregarded the intent of the drafters of the Warsaw Convention, so as to render that treaty nugatory and void and deprive petitioners of rights under the treaty.

3. Whether the sanction by the Court of Appeals of the misuse in the district court of an order or regulation of the Irish government, found not to have been violated, but forming a major basis of respondents' claim of wilful misconduct, was such a flagrant departure from the accepted and usual course of judicial proceedings as to require the exercise of this Court's power of supervision over both courts.

4. Whether the Court of Appeals, in order to sustain the verdict of the lower court, (a) did not exceed its powers by pronouncing a new rule of law requiring airlines to instruct passengers with respect to life vests before taking off from runways in foreign countries, and (b) did not by such pronouncement ignore the Chicago Convention, an international treaty, thereby requiring an exercise of this Court's power of supervision.

5. Whether in permitting respondents to impeach one of their own witnesses by use of his prior statement, not part of the res gestae but extremely prejudicial to petitioners because of its inflammatory nature, the district court so far departed from the accepted and usual course of judicial proceedings as to require an exercise of this Court's powers of supervision.

6. Whether the district court's denial to petitioners' attorney of the right to object to its charge to the jury, in contravention to Rule 51 of the Federal Rules of Civil Procedure, was such a departure from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision.

7. Whether the district court's charge on five occasions that Sabena, the dispatch agent, was liable for the misconduct of KLM, the principal, just as the principal was liable for the agent's misconduct, and the Court of Appeals' sanction of such a charge, has established a rule of law in conflict with the basic laws of principal and agent.

Treaties, Rules and Irish Order Involved

Treaties

Convention for the Unification of Certain Rules Relating to International Transportation by Air [49 Stat. 3000, et seq.], commonly known as the Warsaw Convention.

Convention on International Civil Aviation [61 Stat. 1180, et seq.], commonly known as the Chicago Convention.

Rules

Rule 26, subdivision (f), and Rule 51 of the Federal Rules of Civil Procedure.

Order

Section 23, subdivision (6)(iii), of the Irish Air Navigation (Operations) Order, 1953.

Pertinent provisions of the foregoing treaties, rules and order are printed in the Appendix infra, pages 25 to 30.

Statement of the Case

Petitioner, KLM, is a Dutch airline engaged in international transportation and is a corporation organized and existing under the laws of the Netherlands. Petitioner, Sabena, is a Belgian airline engaged in international transportation and is a corporation organized and existing under the laws of Belgium. The decedent, William Gordon Tuller, was a passenger on a flight of KLM from Amsterdam to New York which crashed not more than 42 seconds after becoming airborne on its takeoff from its intermediate stop at Shannon, Ireland. The plane crashed in the Shannon Estuary at a point approximately 7,325 feet from the end of the airport runway. As the wheels of the plane left the ground, the control tower radioed its precise takeoff time but no acknowledgment was received from the plane. Receiving no response, the tower made repeated attempts to make radio contact, without success.

After the plane became airborne, the pilots thought that the plane was climbing in the darkness when it suddenly made contact with the water and the crash resulted. Immediately after the crash and in order to prevent fire the main switch was cut, thereby throwing the plane into complete darkness but the crew evacuated passengers into two rubber dinghies which were ejected from the left wing by a mechanical release handle located in the cockpit. Tuller and another passenger made their escape through a rear escape window and swam to the tail of the plane which had, in the meantime, settled sufficiently to enable them to climb up upon the tail. At the time they evacuated the plane they did not know that it had come down on the water but thought that it had come down on land (JA 111a).* Sometime later, pursuant to the command of the plane's captain, the first dinghy, in charge of first officer Parfitt, attempted to work its way to shore. Shortly thereafter shouts from the tail of the plane were heard by members of the crew in the second dinghy and the crew in that dinghy then attempted to maneuver the dinghy around the wing to the tail but their efforts were unsuccessful due to the tide and wind and the size of the paddles.

For over four hours Tuller and his companion remained on the tail in a rising tide. Near dawn, after a member of the crew from one of the dinghies finally reached shore, information of the crash and its location reached the tower, and a launch was dispatched to the crash scene. Just as the launch approached, with the water by then chest high, Tuller shook hands with

* JA references are to the Joint Appendix in the Court of Appeals.

his companion, waved to the launch, lost his footing and slipped into the water (JA 116a); his body was later recovered. Ellis, the other passenger on the tail, was rescued.

The jury was instructed that under the Warsaw Convention, which the court ruled covered the liability of the airline and Sabena, its dispatch agent, the damages were to be limited to $8300 unless defendants, or either of them, was guilty of "wilful misconduct", in which case the $8300 limit did not control. The jury returned a verdict for the plaintiffs in the amount of $250,000.

At the close of the entire case the trial judge denied defendants' motion that it direct the jury "that in the event that they find wilful misconduct that they specify in a special verdict what the act of wilful misconduct is that they found" (JA 572a). Consequently, what act or acts the jury may have considered to be wilful misconduct is unknown. The Court of Appeals determined that the alleged wilful misconduct of the appellants in this case resolved itself into four elements, to wit: (1) failure to properly instruct passengers of the location of life vests and in their use; (2) failure to broadcast an emergency message; (3) failure to take steps to provide for the safety of Tuller after his peril was known; and (4) failure of Sabena to be aware of the loss of radio communication with the plane and to initiate prompt search and rescue operations (App. 37).*

* App. references are to pages of the appendix to this petition

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals has so far sanctioned departures by the district court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A. The Alleged Wilful Misconduct in Failing to Instruct Passengers of the Location of Life Vests and Their Use is Based Upon a Total Disregard of the Controlling Effect of Irish Law and the Chicago Convention.

Respondents' proof concerning this item was the testimony of passenger Ellis that no announcement or instructions concerning life vests was made to the passengers before the takeoffs or during the flight from Amsterdam to Shannon and that he did not know where the life vests were located. Respondents also introduced into evidence an order or regulation of the Irish government. This regulation did not require life vest instructions unless and until a flight was more than 30 minutes travel from land (the Irish coastline). This flight, of course, crashed less than a minute's distance from the airport and had not even reached the Irish coastline. The Court of Appeals recognized that the regulation was not violated (App. 37) but then it made the remarkable statement that "We are not bound by the limits of the Irish Government's regulations as to when life vest instructions should be given to fulfill the duty of care owed to passengers." (App. 38)

The foregoing statement by the Court of Appeals was in direct disregard of Article 11 of the Chicago Convention (App. 28), an international treaty and therefore part of the supreme law of the land. Pursuant to that treaty provision, the Irish laws and regulations relating to the operation of aircraft engaged in international air navigation while within Irish territory were the laws and regulations to be applied to the flight involved in this litigation.

The Court of Appeals also stated that "the jury could reasonably have inferred that if Tuller had been wearing a life vest his life could have been saved." This completely ignored the fact that plaintiffs' counsel, out of the hearing of the jury, admitted that decedent died "from shock and exposure and not from drowning" (JA 358a) while arguing for the introduction into evidence of a death certificate of the Irish government.

In his closing statement, plaintiffs' counsel belabored the point that KLM had violated the Irish regulation (JA 574a-576a, 597a) and, over defendants' objections, the court permitted him to continue with such argument (JA 630a). And in his final concluding remarks he again charged that KLM had violated this Irish regulation (JA 633a). Nevertheless, despite the district court's ruling during the trial that what had transpired with relation to the trip from Amsterdam to Shannon was immaterial and should be excluded (JA 158a, 286a), and despite the Court of Appeals finding that the Irish regulation was not violated, the latter made the incomprehensible statement (App. 43) that "the applicability of the [Irish] order was a fair subject of comment in argument and there is no substantial basis for disturbing the verdict on this ground."

B. The Second Alleged Item of Wilful Misconduct, to-wit, the Failure of the Crew to Broadcast an Emergency Message, Is Based Upon the Erroneous Admission Into Evidence of Irrelevant Documents, and the Failure of the Court to Properly Charge the Jury or Afford Defendants an Opportunity to Except to Such Failure.

In its opinion the court speculates as fallaciously as did plaintiffs' counsel in his summation as to what effect a distress message with the words "May Day" might have produced if such a message had been sent by a member of the crew. The court asserts that if such a message had been sent, the authorities would have immediately been aware of the crash and that rescue equipment would have been dispatched promptly rather than four hours later. However, nobody so testified at the trial. As a practical matter, if such a message had been sent it would not have alerted or advised anyone that the plane had crashed; it would merely have indicated that the plane was in trouble but not whether it was in the air, on the ground, or in the water.

Additional serious error was committed by the introduction into evidence of pages of a KLM manual relating to planned ditching procedures. Parfitt, the copilot, pointed out that these ditching procedures referred to "a planned emergency landing on water", whereas "an involuntary contact with the water * * * is more in the nature of a crash" and that he would not call the latter a ditching (JA 211a-212a). Plaintiffs' counsel then read from a prior deposition in which the witness had testified (JA 213a):

"Q. What instructions do you have in case of

> an involuntary landing on water? A. The only thing one can do in case of an involuntary landing on water is to try to carry out as many of the instructions for a planned landing on water as are possible. Some of these instructions require foreknowledge and a certain amount of time to organize the ditching."

Based on this wholly improper foundation and despite the fact that the witness had stated that a planned ditching and a crash were two entirely different things, the court admitted the pages, relating to what should be done before a planned ditching, into evidence. Thereafter, plaintiffs' counsel read to the jury such provisions about notifying surface stations and ships of an emergency as soon as it arises (JA 437a-438a), and in his summation, plaintiffs' counsel was permitted to make improper accusations against the crew for not performing duties described in these pages, although they were wholly inapplicable to the unanticipated crash.

In overruling defendants' objection to the introduction of the pages of this manual into evidence, the trial court said (JA 49a): "When I charge, I will try to give the jury the situation."

However, the court never did charge or instruct the jury on this matter and defendants' counsel was deprived of the right to except to the court's failure to do so. This was a particularly serious error in view of the charges of plaintiffs' counsel in summation concerning the failure of the radio operator to perform duties referred to in this irrelevant exhibit (JA 578a, 584a).

The Court of Appeals not only condoned these prejudicial errors but actually quoted one of these irrelevant paragraphs from the KLM manual in its opinion, as support for its affirmance of the judgment (footnote App. 38).

C. The Third Alleged Item of Wilful Misconduct, to wit, the Failure to Take Steps to Provide For the Safety of Tuller After His Peril Was Known, is Based on the Sheerest Speculation on the Part of the Court.

The Court of Appeals found, as it had to, that the crewmen in the second dinghy had attempted to maneuver the dinghy around the wing of the plane to the tail to rescue Tuller as soon as they heard shouts from the tail. The court also found that "the round rubber vessel would not respond to their paddles and instead drifted with the tide towards the shore." The court then speculated on various methods which it assumed that the crew might have followed in efforts to rescue Tuller from the tail of the plane (App. 40). However, each such suggested course of action was not only impractical but there was not one word of testimony that any such suggestion could have been followed on that fatal night—considering the condition of the plane, the darkness, the tide, and the wind in effect at that time. As a matter of fact, to suggest that Tuller could have been saved by being led along the slippery curved top of the outside surface of the fuselage of the plane, as the Court of Appeals did, is ridiculous. A rescue over such a surface on dry land in the daytime would have been an extremely hazardous feat but it was totally impossible under the conditions that existed on the night in question. Yet it is upon the failure to take

just such "rescue actions" that the Court of Appeals attempts to spell out wilful misconduct on the part of the defendants.

D. The Fourth Alleged Item of Wilful Misconduct, to wit, the Failure of Sabena to be Aware of the Loss of Radio Communication With the Aircraft and to Initiate Prompt Search and Rescue Operations, is Based Upon an Improper Charge to the Jury to Which Defendants Were Denied Opportunity to Except.

Everything that was possible to be done was being done by the governmental authorities to make contact with the plane from the time it departed from the Shannon Airport up to the time the first survivor reached shore. Had Sabena known that the plane was out of radio contact immediately following the takeoff, the only thing it could have done was to urge the Irish government control services to make every effort to make contact with the plane. However, that is exactly what these air traffic control services were doing from the time of takeoff until the time the plane was discovered (JA 525a-563a). The testimony in the case was undisputed that all of the air traffic control services were provided by the Irish government; that the search and rescue facilities were also provided by the Irish government for all users of the airport; and that the government officer in charge of the air traffic control was responsible for alerting the search and rescue organization if it should be required.

It was also the uncontradicted testimony that the government traffic control was responsible for seeing that the position reports which the aircraft should send were received within a specified time and that

if the position reports were not received, that traffic control would call the Ballygireen radio station and ask that steps be taken to get such reports.

Near the close of the trial, plaintiffs' attorneys brought out on cross-examination of the witness Melling, that Aer Lingus, an Irish airline, was the operational representative of KLM at Shannon and that Sabena under its contract with KLM was supposed to keep the operational representative informed of all movements of KLM aircraft and of any retarded progress or interruptions of these flights (JA 519a-520a). There was also read into evidence by plaintiffs' attorneys, one of Sabena's answers to an interrogatory which pointed out that the operational representative was "responsible for ground handling of Carrier's [KLM's] aircraft" (JA 61a). However, there was no other testimony as to what was required of this operational representative. Nevertheless, in the absence of any proof on the subject, the Court of Appeals gave its opinion that Sabena was guilty of wilful misconduct because it failed to "initiate through Aer Lingus emergency surface craft investigation in the area of the known takeoff pattern."

The Court of Appeals also made the unsupported and incorrect finding, based solely upon the gratuitous statements of plaintiffs' counsel during summation, that "Aer Lingus was the local facility capable of instituting a search." The inference on the court's part was that if Aer Lingus had been alerted by Sabena, Tuller's death might have been prevented. This was the rankest and sheerest speculation by the court and was based upon no evidence at all.

The trial court had charged that KLM and Sabena were covered by the provisions of the Warsaw Convention and that Sabena was the agent of KLM (JA 639a). With this part of the charge, the Court of Appeals apparently agreed (App. 34, 43). However, five times during the charge to the jury, the court indicated that the jury might bring in a verdict in excess of $8300 against both defendants if they found an act of wilful misconduct on the part of "either" of them.* Under this charge the agent was held to be liable for the act of the principal; a concept of liability utterly foreign to the laws of principal and agent, 2 C. J. 824.

At the conclusion of the court's charge to the jury, counsel approached the bench to note their objections or exceptions to the charge. After two of plaintiffs' counsel had noted their objections and requests, defendants' counsel attempted to note his objections and the following transpired (JA 648a):

> "Mr. Junkerman: Does Your Honor wish us at this time to express our exceptions?
>
> The Court: I took this charge up with both counsel, and in the circumstances, there is no exception to the charge. Now, don't tell me that there is."

Despite the foregoing and despite the fact that appellants raised this point on appeal, the Court of Appeals ignored the record and said (App. 51):

"We have examined the portions of the record

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* This statement appears in the Joint Appendix on the last two lines of page 640a; on lines 15 and 16 and on lines 31 and 32 of page 641a; on lines 3 and 4 of page 642a; and on lines 22 and 23 of page 646a.

relied on by appellants to show that the District Judge in some way impeded or prevented the recording of a timely objection. We are satisfied that appellants had full and uninhibited opportunity to object to the charge concerning the liability of SABENA if they desired but failed to do so."

E. The Court Permitted Gross Abuses in the Misuse of the Radio Operator's Deposition, in Allowing Plaintiffs to Impeach Their Own Witness, and in Making Rulings Highly Prejudicial to Defendants.

Plaintiffs took the deposition of Henri E. Oudshoorn, as a witness, in the United States Courthouse, Foley Square, New York, on March 16, 1959, pursuant to a subpoena that they had previously served upon him. At that time, Oudshoorn was employed as a dispatcher for Swissair, a Swiss airline, at Idlewild Airport, New York. Although he was the KLM radio operator on September 5, 1954, he had not been employed by or connected with KLM in any way since July 1958 (JA 274a-275a).

Although he was plaintiffs' witness as to numerous matters upon which there was no contradictory testimony, plaintiffs' counsel, who introduced parts of his deposition into evidence, repeatedly asked the jury to disbelieve Oudshoorn's testimony on practically every important item on which he had testified (JA 578a-579a, 580a-581a, 597a, 633a-634a).

Over defendant's objection, a statement made by Oudshoorn to an Irish government inspector on the afternoon of September 5, 1954, at Shannon Airport,

was received in evidence during the reading of his deposition (JA 313a-315a). The statement referred to reads as follows (JA 316a-317a):

> "Q. This may sound a stupid question, but I want to ask it in order to clear up a point here that would be in other evidence. Did you at any time use 121.5? A. After this happened?
>
> Q. At any time. A. No, sir. We were tuned at frequency of 118.7, the tower frequency, and I honestly must say I did not think when it happened to take the microphone and tell people there was something wrong on the plane. I could tell you that would never happen. You first think of your skin, and then of the microphone. That was my feeling, because it happened so fast."

The foregoing statement, made some twelve hours after the accident had no probative value other than to stir up passion, bias and prejudice on the part of the jury and that is exactly the way plaintiffs' counsel used it. He used the statement in summation as follows (JA 580a):

> "He thought of his skin, and the reason he was placed in that dilemma of choosing his own skin or Tuller's skin or the other passengers' skin was because he had been thrown out of his seat by the force of that shudder, * * *"

Once plaintiffs introduced into evidence Oudshoorn's deposition they made him their own witness. Thereafter they had no right to impeach and discredit him nor any right to attack his credibility by asking the jury to disbelieve his uncontradicted state-

ments. Fed. R. Civ. P. 26 (f); Wigmore on Evidence, Third Edition, §§912-913.

In commenting upon the Oudshoorn statement, the Court of Appeals said (App. 45-46): "The challenged statement must be viewed as an important piece of substantive evidence on the issue of wilful misconduct." The court cited no authority supporting such a holding—undoubtedly due to the fact that the authorities are to the contrary. As is pointed out in Wigmore on Evidence, Third Edition, §1018:

> "It is universally maintained by the Courts that Prior Self-Contradictions are not to be treated as having any *substantive* or *independent testimonial value.*" (Emphasis Wigmore's.)

Similarly, in *Southern Ry.* v. *Gray*, 241 U.S. 333 (1916), Mr. Justice Reynolds, in speaking for a unanimous Supreme Court, said (p. 337):

> "In an effort to discredit the passenger engineer, only witness to some circumstances, he was asked on cross-examination concerning prior contradictory statements; but the exclusion of all or any part of his evidence would not change the result. *Of course the contradictory statements can have no legal tendency to establish the truth of their subject-matter.* [citing cases]" (Emphasis supplied.)

The Court of Appeals, after conceding that the statement did "not meet the standards of res gestae, in relation to the accident" (App. 46), cited some totally unrelated decisions and concluded with the following ruling (App. 50):

> "We hold that the statement made by Oud-

> shorn, the KLM radio operator, as part of the authorized inquiry into the causes of the crash and relating to his duties and acts within the scope of his employment was properly admitted in evidence."

However, the statement had nothing to do with the cause of the crash. The record is clear that the statement was offered (JA 313a) and received by the trial judge (JA 315a) with the plain understanding that it was contradictory of Oudshoorn's deposition testimony as to why he had not sent an emergency message. As Mr. Justice Cardozo stated in *Shepard v. United States*, 290 U.S. 96, 103 (1933), "A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected."

II

The Court of Appeals has interpreted a federal treaty in such a manner as to render the treaty nugatory and void.

The opinion of the Court of Appeals notes that the phrase "wilful misconduct" occasioned considerable discussion in the drafting of the Warsaw Convention in 1929 and that the United States was not a participant in such discussions (App. 36). The court further points out that in the discussions at the conferences which finally drafted the Warsaw Convention, the English delegate said as to the meaning of the word "dol" appearing in the French original, "[W]e translate these words as 'wilful misconduct', a well-understood expression in our law" (App. 36). It additionally points out that when the Convention

was before the United States Senate for consideration in 1934 the word "dol" was translated* as "wilful misconduct" (footnote App. 36). Having thus briefly reviewed the conference discussions which led to the translation of "dol" in this country as "wilful misconduct", the Court of Appeals totally ignored the "well-understood expression" in English law, and equated wilful misconduct with "the negligence in question"; an interpretation expressly rejected both in England and this country.

In *Lewis* v. *Great Western Railway Co.*, [1877] 3 Q.B.D. 195, Bramwell, L. J., stated as follows (p. 206):

> "* * * 'Wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence; the *mis*conduct, not the conduct, must be wilful. * * *"

And in the same case, Cotton, L. J., stated (p. 213):

> "* * * Now, I do not think there can be any doubt at all that wilful misconduct is something entirely different from negligence, and far beyond it, whether the negligence be culpable, or gross, or howsoever denominated. * * *"

In *Graham* v. *Belfast and Northern Counties Railway Co.*, [1901] 2 I.R. 13, defined this well-understood expression as follows (p. 19):

> "[W]ilful misconduct in such a special condition means misconduct to which the will is a party

* The French text, as proclaimed, is the official text. The original translation given by the Department of State for "dol" was "deception". Bulletin of Treaty Information, No. 7, Supplement dated October 12, 1929. In the Irish translation "dol" is translated as "malice". Air Navigation and Transport Act, 1936, First Schedule, Article 25.

> as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, * * *."

More recently, in *Horabin* v. *British Overseas Airways Corporation*, [1952] 2 A.E.R. 1016, this well-understood expression in English law has again been distinguished from negligence in a case involving the Warsaw Convention, as follows (p. 1019):

> "* * * Wilful misconduct, to put it most shortly, as it has often been put in the past, is misconduct to which the will is a party, and it is something which is wholly different in kind from mere negligence or carelessness, however gross that negligence or carelessness may be. * * *"

The incompatibility between the well-understood expression, wilful misconduct, and negligence is not limited to English law, but is recognized in this country as well, as the following illustrative cases clearly indicate:

Kelly v. *Malott*, 135 Fed. 74, 76 (7th Cir. 1905):

> "* * * Negligence and willfulness are as unmixable as oil and water. 'Willful negligence' is as self-contradictory as 'guilty innocence.'"

Baltimore & O. R. Co. v. *Felgenhauer*, 168 F.2d 12, 16 (8th Cir. 1948):

> "* * * And negligence and wilful misconduct are not synonymous. * * *"

New York, New Haven and Hartford R. Co. v. *Gray*, 240 F.2d 460, 464 (2d Cir. 1957):

> "* * * Negligence, whether or not 'gross,' but for which the accident would not have occurred, will

> not serve as a defense to such a policy. Only 'wilful misconduct,' measuring up to 'knavery' or 'design,' will suffice; and neither the evidence nor the judge's findings of fact show such conduct. True, the judge, in the last paragraph of his opinion, referred to the gross negligence as if it constituted wilful misconduct. There we think he erred. * * *"

From the foregoing it is abundantly clear that the Court of Appeals erroneously interpreted the expression "wilful misconduct" as it appears in Article 25 of the Warsaw Convention, when it stated that "the negligence in question contributed proximately to Tuller's death" (App. 43). If this interpretation of Article 25 is accepted, one of the basic purposes of the Convention, the establishment of uniform rules with respect to the liability of air carriers, will become wholly illusory. The right to limit liability, unless the damage is caused by the wilful misconduct—not the negligence—of the carrier is a right expressly conferred by the international treaty. This Court has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect, *Kolovrat* v. *Oregon*, 366 U.S. 187, 193 (1961). As was said by Mr. Justice Story in *The Amiable Isabella*, 6 Wheat. 1, 72, 19 U.S. 1, 32-33 (1821):

> "* * * [T]his court is bound to give effect to the stipulations of the treaty, in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. * * *"

III

The Court of Appeals has decided a question involving important rights asserted in reliance upon federal treaty obligations which has not been, but should be, settled by this Court.

The Warsaw Convention clearly declares as one of its basic purposes* "the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of * * * the liability of the carrier". Article 17 of the Convention imposes an absolute liability upon the carrier in the event of the death or wounding of a passenger, regardless of fault, "if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." This liability is excluded by Article 20(1) if the carrier proves that it has "taken all necessary measures to avoid the damage or that it was impossible" for it to take such measures. However, Article 25(1) provides that the carrier shall not be entitled to avail itself "of the provisions of this convention which exclude or limit" its liability, if the damage is caused by its "wilful misconduct" or by such default on its part as "in accordance with the law of the court to which the case is submitted" is equivalent to wilful misconduct. The exclusion refers to Article 20(1) and the limitation to Article 22(1) which provides that "the liability of the carrier for each passenger shall be limited" to $8,300.

The rights conferred by the Convention to exclude or limit liability would fall far short of the goal of

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* Preamble, 49 Stat. 3014.

uniformity if the courts of each of the fifty states and the District of Columbia are free to equate "the negligence in question" with wilful misconduct. Although the Convention provides that the right to limit liability is lost if the damage is caused by such default on the part of the carrier as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct, this Court has the right, indeed the duty, to exercise its power of supervision to the end that there is uniformity of interpretation of this international treaty by the courts of this nation, both state and federal. Without such uniformity there is no "supreme law of the land"; rather there are fifty-one possible divergent and hopelessly incompatible laws. The objective of uniformity is not achieved where, as here, the Court of Appeals pays mere lip service to the definition of wilful misconduct contained in the charge of the lower court to which the case was submitted, and then proceeds to equate wilful misconduct with "the negligence in question" (App. 43).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM J. JUNKERMAN,
Counsel for Petitioners.

Dated September 20, 1961

JAMES B. MCQUILLAN,
Of Counsel.

Pertinent Provisions of the Warsaw Convention

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, dam-

ages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Pertinent Provisions of the Chicago Convention

PART I. AIR NAVIGATION

CHAPTER I

GENERAL PRINCIPLES AND APPLICATION OF THE CONVENTION

Article 1

The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

Article 2

For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

Chapter II

Flight Over Territory of Contracting States

* * * *

Article 11

Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.

Federal Rules of Civil Procedure

Rule 26. Depositions Pending Action.

* * * *

(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one

who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership or association which is a party may be used by an adverse party for any purpose.

* * * *

(f) Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

* * * *

Rule 51. Instructions to Jury: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Irish Air Navigation (Operations) Order, 1953

PART V

AIRCRAFT INSTRUMENTS, EQUIPMENT AND SAFETY DEVICES.

23. — * * *

(6) The operator of the aircraft shall take steps to the satisfaction of the Minister to ensure—

* * * *

(iii) that, if a landplane is to be flown over water beyond thirty minutes flying distance from the nearest shore, the passengers are shown before the takeoff, or before reaching thirty minutes flying distance from the nearest shore, the position of the life belts, or equivalents, and the method of their operation;

* * * *

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15716

KONINKLIJKE LUCHTVAART MAATSCHAPPIJ N.V. KLM ROYAL DUTCH AIRLINES HOLLAND, et al.,

Appellants,

v.

GERTRUDE OWEN TULLER, individually and as Executrix under the will of William Gordon Tuller, deceased, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided June 23, 1961

Mr. William J. Junkerman for appellants.

Mr. Murdaugh Stuart Madden for appellees.

Before: MR. JUSTICE REED, retired,* and WILBUR K. MILLER, Chief Judge, and BURGER, *Circuit Judge*.

BURGER, *Circuit Judge:* This is an appeal from a $350,000 judgment for the appellees in an action for

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* Sitting by designation pursuant to 28 U.S.C. § 294(a).

wrongful death. The decedent, William Gordon Tuller, was a passenger on a flight of Koninkijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland, (KLM), from Amsterdam to New York which crashed approximately one minute after take-off from its intermediate stop at Shannon, Ireland. The plane crashed in the tidewaters of the Shannon River some 7000 feet from the end of the airport runway. As the wheels of the plane left the ground, the control tower radioed its precise take-off time but the acknowledgment required to complete the take-off procedure was not forthcoming from the plane. Receiving no response, the tower made repeated attempts to make radio contact, without success. SABENA (Societe Anonyme Belge d'Exploitation De La Navigation Aerienne), KLM's agent and flight representative at Shannon, had a radio capable of monitoring such messages. On this occasion the monitor was turned off immediately after the tower sent its part of the take-off message without awaiting the plane's response. As a consequence SABENA officials were not aware for some time of the failure of the KLM flight to answer. When the tower eventually notified SABENA of the loss of radio contact, SABENA did not advise Aer Lingus, KLM's operational representative, although it was SABENA's duty under its contract to inform Aer Lingus of probable interruptions of service or retarded progress of the flight "as soon as possible." In the KLM plane three radio microphones were available to the flight crew, the pilot, co-pilot and radio officer, and each microphone was tuned to the tower frequency. Notwithstanding this, no distress message was transmitted either when the plane began to descend or after the crash. When the plane "shuddered" in a stall the

radio officer primarily charged with radio communications was thrown from his seat because he had failed to fasten his seat belt as required by operating regulations.

After the crash in shallow water, the crew evacuated most of the passengers to two rubber dinghies, which were moved along the side of the plane by means of ropes fastened to the fuselage. Tuller and another passenger made their escape through a rear window and stood on the tail of the airplane without life preservers. When their shouts were heard by the members of the crew in the second dinghy, the crew attempted to maneuver the dinghy around the wing. Finding the tow line too short, they cast off the line and attempted to paddle the dinghy to the tail, but their efforts were unsuccessful due to tide and wind and the inadequate size of the paddles. Additional ropes were available in the cockpit but were not used. The ship's officers made no effort to determine the condition of the passengers on the tail of the plane or to ascertain whether they had life vests.

For over four hours Tuller and his companion remained on the tail in a rising tide. Near dawn, information of the crash and its location finally reached the tower, and a launch was dispatched to the crash scene. Just as the launch approached, with the water by then chest high, Tuller lost his footing and slipped into the water; his body was later recovered. His companion was rescued.

A booklet inserted in the back of each seat of the plane stated that life vests could be found in one of three locations in KLM planes, but at no time was the matter of life vests brought to the attention of the passengers nor had they been told the specific location

of the vests in this airplane or how they should be fastened or inflated.

The jury was instructed that under the Warsaw Convention, which the court ruled governed the liability of the airlines, the damages were to be limited to $8300 unless the defendants were guilty of "wilful misconduct," in which case the $8300 limit did not control.[1] The jury returned a verdict for the plaintiff in the amount of $350,000.

The appeal presents these issues:

(1) Was there sufficient evidence of "wilful misconduct" to go to the jury?

(2) Was there error in the reception in evidence of

(a) an Irish order pertaining to instruction on use and location of life vests,

(b) pages of a KLM manual relating to ditching procedures,

(c) the contract between KLM and SABENA,

(d) a statement made by the radio operator at a hearing before Irish authorities some twelve hours after the crash?

(3) Was there reversible error in the failure of the trial judge, absent request or objection, to clarify

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[1] The Warsaw Convention provides:

"(1.) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct." Warsaw Convention, Art. 25, 49 Stat. 3020 (1934).

the impact of KLM's negligence on SABENA's liability?

(4) Was there sufficient evidence to support the damage award?

Evidence of Wilful Misconduct

At the close of the case appellants moved to dismiss the complaint for all amounts in excess of $8300 and for a directed verdict in favor of appellees for $8300 for want of evidence of wilful misconduct under the terms of the Warsaw Convention. In considering whether the appellants were, as they claim, entitled to the relief they sought by their motion we are, of course, obliged to take that view of the evidence most favorable to appellees and give them the benefit of all inferences which might reasonably be drawn from the evidence. *Gunning* v. *Cooley*, 281 U.S. 90, 94 (1930).

> On a motion for a directed verdict, "* * * it is well settled that the evidence must be construed most favorably to the plaintiff; to this end he is entitled to the full effect of every legitimate inference therefrom. If upon the evidence, so considered, reasonable men might differ, the case should go to the jury; if, on the other hand, no reasonable man could reach a verdict in favor of the plaintiff, the motion should be granted." *Jackson* v. *Capital Transit Co.*, 69 App.D.C. 147, 148, 99 F.2d 380, 381 (1938), *cert. denied*, 306 U.S. 630 (1939), quoted in *Kendall* v. *Gore Properties, Inc.*, 98 U.S.App.D.C. 378, 384 n.3, 236 F.2d 673, 679 n.3 (1956).

The jury was instructed that "wilful misconduct is the intentional performance of an act with knowledge that the . . . act will probably result in injury or damage, or . . . in some manner as to imply reckless disregard of the consequences of its performance; and likewise, it also means . . . failure to act" in such circumstances. This was substantially the charge approved by this court in *American Airlines, Inc.* v. *Ulen*, 87 U.S.App.D.C. 307, 186 F.2d 529 (1949), where we also suggested that wilful misconduct means "a deliberate purpose not to discharge some duty necessary to safety." *Id.* at 311, 186 F.2d at 533.

The phrase "wilful misconduct" occasioned considerable discussion in the drafting of the Warsaw Convention in 1929. Liability was limited to 125,000 French francs (then approximately $12,500—and now approximately $8,300) for a single passenger unless Article 25 of the Convention applied. See note 1, *supra*. The United States was not a participant but in the discussions relating to the meaning of the French word "dol" used in the text of Article 25 the English delegate said "I wish it to be noted on the record that as a result of the explanations we translate these words[2] as 'wilful misconduct,' a well-understood expression in our law."[2]

[2] We have in our country the expression 'wilful misconduct' . . . it covers not only acts accomplished with deliberation, but also acts of carelessness, without regard of the consequences." Proces-Verbaux II Conference Internationale de Droit Prive Aerien, 4-12 Octobre 1929, Varsovie, p. 40-42, published by the Ministry of Foreign Affairs of Poland, 1930. The declaration of adherence to the Convention as advised by the Senate was accompanied by an English translation which used the words "wilful misconduct" to translate "dol." 49 Stat. 3020 (1934). This was the English translation before the Senate for consideration. 78 Cong. Rec. 11580 (1934).

The alleged wilful misconduct of the appellants in this case resolves itself into four elements: (1) failure to properly instruct passengers of the location of life vests and in their use; (2) failure to broadcast an emergency message; (3) failure to take steps to provide for the safety of Tuller after his peril was known; (4) failure of SABENA to be aware of the loss of radio communication with the plane and to initiate prompt search and rescue operations.

(1) The evidence showed that Tuller was alive within seconds before the rescue launch reached the airplane, but that he lost his footing, fell into the water, and was lost. Since the parties stipulated that Tuller was not injured in the crash, the jury could reasonably have inferred that if Tuller had been wearing a life vest his life could have been saved. Significantly, the crew members, who knew the location of life vests, realized the need and promptly put them on.

There was testimony that no announcements or instructions concerning life vests were made to passengers before take-offs or during flight, and the passenger who stood with Tuller on the tail testified that he did not know where the life vests were located. The descriptive booklets inserted in the back of each seat stated that the life vests could be found in one of three places, but at no time were the passengers informed where they could be found in this particular aircraft. Regulations of the Irish Government do not require life vest instructions unless a flight is more than 30 minutes travel from land. This flight was always within 30 minutes flight from land provided it maintained normal flying speed—and remained airborne, which of course it did not.

In view of the gravity of the harm which would fol-

low an emergency landing on water on a night flight which contemplated landings and take-offs at at least two airports near the sea, the jury could reasonably find that the failure of KLM to establish and execute procedures to instruct passengers as to the location and use of life vests was a conscious and wilful omission to perform a positive duty and constituted reckless disregard of the consequences. We are not bound by the limits of the Irish Government's regulations as to when life vest instructions should be given to fulfill the duty of care owed to passengers. *Cf. Horobin* v. *British Airways Corp.* [1952] 2 A.E.R. 1016, 1019 (Q.B.).

(2) A distress message could have been sent merely by uttering the universal distress signal in the words "King Yoke Mayday" or even "Mayday." Immediately before take-off the radio officer was at his desk in the plane with a microphone before him tuned to the tower frequency. But during the descent he was thrown to the floor because he had failed to take his seat and fasten his seat belt. The KLM operations manual required all personnel to have a "conscious anticipation prior to take off of possible failure," and to send a distress message as soon as an emergency arose.[3] Regulations of the Irish Government also required public transport aircraft to notify appropriate authorities "by the quickest means available" of any accident involving the aircraft. The plane was equipped with radio microphones at three positions; the pilot's, the co-pilot's and the radio operator's.

[3] The KLM operating manual, page 36, states:

"Surface stations and ships should be informed of the existence of an emergency as soon as it arises. This should be done even if it is not certain that the airplane will have to be ditched. It is easy enough to cancel the call after the emergency is over."

Here there was a brief period, even if only seconds, as to which a jury could reasonably find that the behavior of the plane gave notice of a possible crash and time sufficient to utter the distress signal. Furthermore, there was no attempt to send a message *after* the crash; there was evidence that the electrical system was so organized that the plane's radio would operate from independent power after the main ignition switch was thrown to avoid explosion and fire. In addition there was a portable emergency radio operable by hand crank in the rear of the plane.

Had a message been sent the control tower by any of the available means, the authorities would have been immediately aware of the crash and rescue equipment could have been dispatched promptly rather than some four hours later. Accordingly, the jury was warranted in concluding that KLM's agents, in failing to send a distress message, committed wilful misconduct.

(3) After the first dinghy was filled with passengers, the captain instructed the crewman in charge to take it to shore. The captain and radio officer made a final check for passengers in the cabin and then boarded the second dinghy. Shouts were heard from the passengers on the tail, and the crewmen attempted to maneuver the dinghy around the wing with the ropes attached to the fuselage. Finding the rope too short, and fearing to take the dinghy over the sharp edge of the wing, they released the rope and tried to paddle the dinghy. But the round rubber vessel would not respond to their small paddles and instead drifted with the tide toward the shore. The crewmen had no experience in the use of the dinghies except in a large swimming pool.

The crew was aware that it was possible to maneuver the dinghy by ropes attached to the fuselage because they had previously maneuvered it to the main door in that fashion. Moreover, additional lengths of rope sufficient to reach the tail were available in the cockpit. Various alternatives were plainly available: one of the crew could have swum to the tail of the plane with the rope and pulled the dinghy to the men or vice versa, as had been done with respect to moving the dinghy in earlier maneuvering. No effort was made to put a crew member on top of the cabin by use of ropes thrown, or carried by a swimmer, to the opposite wing engines. Had this been done the tail passengers might well have been guided over the top of the cabin to the dinghy. The jury could reasonably find that under these circumstances the failure to take available steps to provide for Tuller's safety was a conscious omission made with reckless disregard of the consequences when it was known he was in a position of peril. There is no suggestion that the departure of the second dinghy without making some effort to provide for Tuller's safety was necessary to protect the lives of the occupants of that dinghy.

(4) As agent for KLM, SABENA was charged by contract[4] with checking the progress of the flight and

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[4] SABENA contracted to "render . . . services to the Carrier's [KLM's] flight operating within the area of responsibility [at Shannon] as described in Paragraph 3 of this Annex thereby maintaining close liaison with the operational representative [Aer Lingus] designated by the Carrier so as to coordinate his requirements."

* * * *

"Maintain contact with all flights within his area of responsibility noting advanced or retarded progress as compared with flight plan and inform the operational representative [Aer Lingus] designated by the Carrier."

* * * *

"In the event of an emergency, take action necessary for the

notifying Aer Lingus, the operational representative of KLM, in the case of retarded progress of the flight. However, as a result of the switching off of the SABENA monitor radio without waiting for completion of the take-off message and before it was known whether the airplane had failed to respond together with the absence of SABENA employees from the office at subsequent periods, Aer Lingus was not notified of the loss of communication for several hours, nor was the KLM station manager so notified.[5]

While the control tower personnel had broad duties with respect to contact with the plane and did in fact remain aware of the plane's failure to respond, SABENA as KLM's agent had *contract* duties as noted in the margin. But SABENA was seemingly satisfied with the loss of contact with the KLM plane at the critical moments of take-off, landings and take-offs being the most hazardous of their operations. In view of this it is less surprising that the tower personnel did not pursue the matter aggressively. The vital importance of communication between pilot and control tower is suggested by the severe governmental sanctions for failure to perform required acts of com-

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safety of the flight being guided by the instructions in the relevant Operations Manual. . . ."

* * * *

"Report the complete facts of any incident of a flight operation nature which causes delay or interruption of a flight to the operations department of the Carrier."

* * * *

"Ensure that probable or known interruptions to schedules for flight operational reasons . . . are given as soon as possible to the operational representatives designated by the Carrier."

[5] There was evidence that it was the established practice that a radio message was not regarded as complete until acknowledged by the recipient. The tower continued to request acknowledgment of its take-off message.

munication. The search and rescue organization of the Shannon airport did not have its own planes. As KLM's operational representative, Aer Lingus was the local facility capable of instituting a search. In recognition of this, the contract between KLM and SABENA, as we have noted, required SABENA to advise Aer Lingus immediately of any facts related to an interruption of service, and to keep Aer Lingus informed of the movements of the aircraft. Some forty-eight minutes after take-off, a SABENA agent learned from the control tower that radio contact with the plane had ceased shortly after take-off. Nevertheless, Aer Lingus was not notified of this fact for another hour and thirty minutes. Finally aware of loss of contact and the plane's failure to report a safe and completed take-off SABENA as KLM's representative had a duty to "take action necessary for the safety of the flight" and press every available inquiry and to initiate through Aer Lingus emergency surface craft investigation in the area of the known take-off pattern.

There no real effort was made to check on the "missing" plane until nearly two hours after take-off when the tower sighted flares in the take-off pattern of the KLM plane. Even then no surface craft were dispatched. Later another plane in routine flight sighted the crashed ship in the growing light of dawn and finally surface craft were dispatched. SABENA's failure to inform Aer Lingus of the loss of communication with the plane it was responsible for, plainly delayed emergency search and rescue action which, had it been initiated in these circumstances even as much as five minutes earlier, could have prevented Tuiler's death. The defaults of SABENA as KLM's ground agent were conscious omissions of performance

of positive duties relating directly to the safety of passengers.

We hold that as to each of the categories of alleged wilful misconduct of KLM there was sufficient evidence from which a jury could reasonably find that KLM was guilty of wilful misconduct as that term has been interpreted by this court under the Warsaw Convention; we hold also that there was sufficient evidence from which a jury could reasonably find that SABENA was guilty of wilful misconduct as that term has been interpreted by this court under the Warsaw Convention. There is also evidence from which a jury could reasonably find that as to each category of wilful misconduct the negligence in question contributed proximately to Tuller's death.

Alleged Errors in the Reception of Evidence

(1) *Irish order as to life vests.* Appellants' objections go solely to the interpretation put upon this order by appellees' counsel in argument to the jury. The applicability of the order was a fair subject of comment in argument and there is no substantial basis for disturbing the verdict on this ground.

(2) *KLM manual.* Pages of a KLM manual relating to the duties of the radio operator when there is a "ditching" of the airplane were admitted over objection. The ground of the objection was that the manual applied only to planned and controlled emergency landing on water and not to an involuntary crash landing. As a result of questions by the appellees' counsel, and questions by the trial judge after impeachment of the witness by a prior deposition, a sufficient foundation was laid for the admission of this

manual in evidence. The radio operator finally admitted that if a crash occurred it was the duty of the crew to carry out as many as possible of the planned ditching procedures.

(3) *KLM-SABENA* contract. It is urged as error that the contract between KLM and SABENA was not construed by the trial court and was the subject of argument in appellees' summation. Appellants did not request specific instructions on the meaning of the contract and made no objection after the charge; they are precluded from raising this objection now. FED. R. CIV. P. 51.

(4) *Radio operator's statement.* Appellees took the deposition of the KLM radio operator, Oudshorn, after his employment with KLM was terminated. In the deposition, which was received as part of the appellees' case in chief, the radio operator stated that he did not send a distress message before the plane crashed because there was not sufficient time to do so. He was then asked if he had made a statement to the Inspector of Accidents at the Shannon airport some hours after the crash. The witness admitted making statements at the hearing in question, which he said was attended by "one of our chief flight engineers of KLM . . . one of the people of the Dutch CAA" and others. At this point appellees offered and the court received over objection a transcript of the radio operator's statement at the hearing before the Inspector of Accidents. Appellants objected to the proffered transcript of Oudshorn's statement on the ground that "it is not part of the res gestae," thus indicating that the statement was challenged as hearsay. After argument the District Court after first indicating that he

regarded it as part of the res gestae, then reconsidered and ruled that

> The statement refers to the accident, otherwise there would be no purpose in having the statement made. It was made . . . at Shannon on the same (488) day of the accident and in response to the particular question as to why he didn't send the message.
>
> I think it is admissible and I will let it in.

The pertinent part of the statement made by Oudshorn at that time was

> We were tuned at frequency of 118.7, the tower frequency, and I honestly must say that I did not think when it happened, to take the microphone and tell people there was something wrong on the plane. I could tell you that would never happen. *You first think of your skin, and then of the microphone*. That was my feeling, because it happened so fast. (Emphasis added.)

The trial judge did not try to limit the effect of this statement in any way. Realistically it could not have been admitted merely for purposes of impeachment in the circumstances shown here.[6] The challenged state-

[6] Appellants' contention that the appellees improperly impeached their own witness, Oudshorn, is contradicted in appellants' own brief by the argument that:

> "The foregoing statement was actually not a contradiction of Oudshoorn's testimony that the accident happened so fast that there was not time to switch the frequencies in order to send out a message and that he did not think of doing so. The statement made some 12 hours after the accident that at the time of an airplane crash one thinks of one's skin before thinking of a microphone, was no more than a mental reaction at the time it was given. It had no probative value other than to stir up passion, bias and prejudice on the part of the jury and that is exactly the way plaintiffs' counsel used it."

ment must be viewed as an important piece of substantive evidence on the issue of wilful misconduct. As such it disclosed an awareness of the existing risks and had a direct bearing on whether there was reckless disregard of the dangers to which the plane and its passengers were exposed.

Appellants argue that the challenged statement does not fall within any of the exceptions to the hearsay rule, pointing out particularly that the hearing at which it was made occurred 8 to 10 hours after the crash. We agree that the utterance was too remote in point of time from the event to sustain its admission as part of the res gestae. However spontaneous in the context of the hearing, it does not meet the standards of res gestae, in relation to the accident.

Appellees contend that Oudshorn's post-accident statement is admissible because it was made while he was an employee of KLM and was his explanation of his performance of duties within the scope of his employment. From this they urge that the utterance is imputable to KLM. In answer to this appellants contend that the radio operator was not a KLM employee when the deposition was taken or when the testimony was read into evidence at trial, and that the radio operator had no duty or authority to make declarations binding on KLM at the hearing of the Inspector of Accidents.

The radio operator was a KLM employee when he uttered the challenged statement. It is true that members of the flight crew of an airline are hired primarily to work for the airline, not to speak for it. But in this context, having in mind the public nature of the duties of a common carrier and the duties of crew members toward common carrier passengers, it was as much a part of the crew's duties to account to

public authority for the manner in which those duties were discharged as it would be to account or report to the employer. Whether KLM acquiesced in the inquiry, or whether it had no choice in the matter is not entirely clear from the record; however the record discloses that a KLM representative was present at the hearing and that Oudshorn's statements were recorded without objection.

Many writers on evidence[7] have urged that rejecting early post-accident statements of an employee while receiving the employee's considered statements in the courtroom perhaps several years after the event is to give preference to the weaker over the stronger evidence. Had Oudshorn made substantially the same utterance within the hearing of a passenger as he emerged from the cabin of the plane we would permit the passenger to testify to what was said as part of the res gestae; yet the passenger's testimony might well come three or four years after the event and be dependent upon his recollection of the words uttered. That, surely, is not more reliable than Oudshorn's statement, against his interest, uttered and recorded some eight hours after the rescue, in a formal process of reporting to the Irish Government concerning the occurrence.

Apparently with this in mind the proposed Model Code of Evidence rule 508(a) admits the employee's statement if "the declaration concerned matter within the scope" of the declarant's employment. See also *Slifka* v. *Johnson*, 161 F.2d 467 (2d Cir.), *cert. denied*, 332 U.S. 758 (1947); *Martin* v. *Savage Truck Line*, 121 F. Supp. 417 (D.D.C. 1954). Oudshorn's statement clearly concerned a matter within the scope

[7] See McCormick, Evidence, § 244, at 519–1951

of the radio operator's employment, since his compliance with undisputed safety regulations was in question.[8] Had he been at his assigned post with his microphone at hand and his instruments tuned to the tower frequency, as they were, he could have uttered the "Mayday" distress signal in a fraction of a second. His explanation of his failure to do this was within the scope of his duties.

Since reliability is the basic test for the admission of any hearsay statement, the interest of the one who utters it and the one to be charged is always important. That this statement is adverse to the interest of KLM is plain. The statement was also adverse to Oudshorn's personal interests in that it entailed the possible loss of his employment, impairment of his future employment opportunities, possible civil liability for Tuller's death, and even the

---

[8] Oudshorn testified:

"Q. Did every member of the flight crew have a seat with a seat belt? A. That's right.

"Q. What is the purpose of seat belts? A. Well, in case of an accident, or in sudden stop or acceleration, that you are not thrown out of your chair.

"Q. And you can continue your duties? A. That's right.

"Q. If you are not thrown out of your chair? A. That's right.

"Q. Is there any regulation requiring that these seat belts be fastened at any particular time? A. Yes, during take off and landing they are supposed to be fastened.

"Q. When you say 'during take off,' how much time does that encompass during take off? A. Well, that means from when you start off blocks until the Captain gives the command to switch off the sign 'Fasten seat belts.'"

* * * *

"Q. Did you feel at the time you felt this shudder, and when you were thrown out of your seat, (466) that the plane was going to crash? Did you have that sensation, that you were going to crash? A. I, personally, had that sensation when I felt this unusual shudder, and going down, that this was a crash. My personal opinion was that it was that."

possibility of criminal sanctions. We think that such a recorded statement meets any reasonable test of reliability. The official nature of the inquiry which elicited the statement, the independent recording of the statement, the source of the utterance, and the interest of the utterer all combine to give the statement the earmarks of reliability absent in *Palmer* v. *Hoffman*, 318 U.S. 109 (1943). Surely, it cannot be said, as to the employee who uttered it or the employer who is charged with it, that its "primary utility is in litigating. . . ." *Id.* at 114. See *Pekelis* v. *TWA*, 187 F.2d 122, 130 (2d Cir), *cert. denied*, 341 U.S. 951 (1951).

The Second Circuit considered the application of the federal shop book rule, 28 U.S.C. § 1732 (1958) to a similar situation in *Pekelis* v. *TWA*, *supra*. There reports of an airline accident investigation conducted by the airline for its own purposes were held admissible. Noting that the challenged material was not favorable to the airline's interests, that court gave the interest factor significant weight in determining "their earmarks of reliability" and in distinguishing *Palmer* v. *Hoffman*, *supra*. We need not reach the question whether the challenged statement here is admissible under the federal shop book rule in light of our holding that it is admissible on other grounds.

We emphasize that we are not here confronted with the problem of the admissibility of opinion evidence. See *New York Life Ins. Co.* v. *Taylor*, 79 U.S.App. D.C. 66, 147 F.2d 297 (1944); *Washington Coca-Cola Bottling Works, Inc.* v. *Taveney*, 98 U.S.App.D.C. 151, 233 F.2d 353 (1956). An added distinguishing factor is that KLM had full opportunity to cross-examine Oudshorn when the deposition was taken for the purposes of this case.

We are not unaware of the traditional arguments which can be advanced that exclusion of post-accident statements of this type may have value in that it tends to encourage free and full disclosure of information. See McCORMICK, EVIDENCE § 78, at 160-61 (1954). But the problem is one of balancing competing considerations and on balance we think the ends of justice are better served by receiving such statements when found to be reliable.

We hold that the statement made by Oudshorn, the KLM radio operator, as part of the authorized inquiry into the causes of the crash and relating to his duties and acts within the scope of his employment was properly admitted in evidence.

Alleged Errors in Instructions

Appellants' brief does not assert any errors in the trial court's instructions to the jury. However, it is contended that the trial judge precluded exceptions to the charge, and that error occurred in the charge with respect to the liability of SABENA. Appellants' supplemental memorandum suggests that the trial court failed to instruct correctly on the liability of SABENA in that the jury was told that a finding of wilful misconduct by *either* or both defendants would bring them to the issue of proximate cause. At no point did the court instruct the jury that if the wilful misconduct were committed solely by KLM, the principal, SABENA, the agent, could not be held liable. No such instruction was requested and no objection was taken to the charge in this respect. It should be noted that KLM and SABENA were represented by the same counsel, although obviously at this point their interests inevitably diverged. Rule

51 of the Fed. R. Civ. P. requires that objection be taken to errors in the charge in order to claim error on appeal. Some courts have taken the view that "the 'plain error' rule may not be utilized in civil appeals to obtain a review of instructions given or refused, where the ground was not raised in the trial court." *Bertrand* v. *Southern Pac. Co.*, 282 F.2d 569, 572 (9th Cir. 1960), *cert. denied*, 365 U.S. 816 (1961).

Of course, if the trial court in fact *prevented* the objection from being made, an inviting case for the application of the "plain error" rule would be presented. We have examined the portions of the record relied on by appellants to show that the District Judge in some way impeded or prevented the recording of a timely objection. We are satisfied that appellants had full and uninhibited opportunity to object to the charge concerning the liability of SABENA if they desired but failed to do so. The trial of this cause was long and expensive and the contentions underscore the need for strict compliance with the rule which treats as waived that to which no timely objection is made.

The claimed error in the scope of appellees' argument to the jury does not merit comment.

Damages

The jury returned a verdict of $350,000 for the appellees. The evidence on the damage issue showed a life expectancy of 36½ years. Tuller earned a salary of approximately $27,000 or $20,000 a year after taxes as vice-president in charge of engineering

at Melpar, a division of Westinghouse Airbrake.[9] Besides his widow, Tuiler was survived by two children then aged four and eight respectively.

The award of $350,000 is attacked as so excessive that it should have been set aside by the District Court. We pointed out in *Hulett v. Brinson*, 97 U.S. App.D.C. 139, 142, 229 F.2d 22, 25 (1955), *cert. denied*, 350 U.S. 1014 (1956), "that the rule in the Federal courts is that an appellate court may reverse, if at all, for excessiveness of verdict only where the verdict is so grossly excessive or monstrous as to demonstrate clearly that the trial court has abused its discretion in permitting it to stand." See *Affolder v. New York, C. & St. L. R.*, 339 U.S. 96, 101 (1950). On the whole record we cannot say that the action of the District Judge who tried the case and heard the post-trial motions constitutes an abuse of discretion or that appellate action with respect to damages is required.

Affirmed.

[9] The appellees tendered but the District Court rejected proffered evidence purporting to show that Tuiler's income would increase over the full span of life expectancy. Such evidence was relevant and should have been received. O'Connor v. United States, 269 F.2d 578 (2d Cir. 1959).

SUPREME COURT, U. S.

OCT 19 1961

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 426

KONINKLIJKE LUCHTVAART MAATSCHAPPIJ N. V. KLM ROYAL DUTCH AIRLINES HOLLAND and SOCIETE ANONYME BELGE D'EXPLOITATION DE LA NAVIGATION AERIENNE, *Petitioners*,

against

GERTRUDE OWEN TULLER, individually and as Executrix under the Will of William Gordon Tuller, deceased, KATHERYN L. TULLER, a minor by GERTRUDE OWEN TULLER, her mother and next friend, and JEAN E. TULLER, a minor by GERTRUDE OWEN TULLER, her mother and next friend, *Respondents*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THE DECISION OF THE COURT OF APPEALS

This is a wrongful death case which was tried by a judge and jury in the United States District Court for the District of Columbia.

The Court of Appeals below in a 21-page opinion reported at 292 F. 2d 775 carefully reviewed the record in the district court, fully examined the points on appeal urged by the Petitioners, and then unanimously affirmed the judgment for the Plaintiff-Respondent. The Court of Appeals not only found that there was no reason to disturb the verdict, but it affirmatively found that the evidence amply supported the jury's verdict, and that the ruling of the trial court in denying the Defendants-Petitioners' motion to set aside the verdict or reduce the award should not be disturbed.

Moreover, the Court of Appeals found that the evidence amply supported four different categories of wilful misconduct and that no errors were committed during the trial. It must be said that the number of categories of wilful misconduct is more a matter of classification than of limitation of the number of acts of wilful misconduct actually committed.

It should be noted that neither in the Court of Appeals, nor in its petition here do the Petitioners seriously dispute the facts upon which respondent rested its claim of the various acts of wilful misconduct. Rather in the Court below the Petitioners claimed that from the acts or omissions to act and from the surrounding circumstances, the jury should not have drawn the inferences from which it found wilful misconduct. Similarly, the Petitioners in effect claim here that the Court of Appeals should not have drawn the same inferences. In the first instance, the Petitioners would disregard the basic function of a jury. In the second, the Petitioners would disregard the review functions of the Court of Appeals.

It is clear that the conditions that would require the extraordinary intervention of this Court do not exist here. In an attempt to accomplish this, the Petitioners have created issues that are demonstrably spurious. It is respectfully submitted that the so-called "Questions Presented" are contrived and rest in the main upon plucking out of context of a word in the opinion, and attempting to impute a result directly contrary to the plain holding and intent of the Court below. Upon such frail foundation is Petitioners' house erected.

RESPONDENT'S STATEMENT OF THE CASE*

At 2:38 a.m. Greenwich Mean Time on September 5, 1954 in clear, calm weather KLM Flight 633 (PKY) took off from Shannon Airport using runway 14 (JA 33a). The flight had originated in Amsterdam, destination New York. The plane was a Lockheed Super constellation carrying a flight crew, stationed in the forward cockpit area, of 7 men, consisting of 4 licensed pilots, 2 flight engineers and a radio operator (JA 33a). The aircraft was equipped with two-way radio in triplicate for individual use of Captain Viruly, Co-pilot Parfitt and Flight Radio Officer Oudshoorn (JA 230a, 278a). This radio equipment was powered from the batteries and would continue to operate even if, due to an emergency, it should become necessary to throw the main switch (JA 337a). In addition, the aircraft carried a portable emergency radio which, upon turning an attached crank, would generate its own power and automatically transmit distress signals to a range considerably more than that involved in

* This statement of facts is in accord with those found by the Court of Appeals.

this case (JA 276a). The aircraft carried 3 self-inflating rubber lifeboats or dinghies (with a capacity of 20 persons each) 2 in one wing and 1 in the other (JA 57a). Available in the cockpit were full face gas or smoke masks for use by the crew, (JA 57a), a number of flashlights and in the same area, lengths of extra rope for emergency use (JA 321a). In the cockpit were also oxygen equipment, including a set of portable oxygen bottles (JA 52a). The aircraft had exit doors which could be opened from the inside or from the outside (JA 72a).

The deceased, Dr. Tuller, was a fare-paying passenger, having boarded the plane at Amsterdam (JA 32a). The crew had failed to advise him or the other passengers of the location of life jackets and to instruct in their use (JA 120a, 132a). 32 to 42 seconds after the aircraft became airborne it made an involuntary landing on the Estuary of the River Shannon (JA 33a), coming to rest on the mud and in a few feet of water. Impact with the water was relatively mild and the plane did not sink. The aircraft did not break apart (JA 123a). There was no fire or explosion at any time. The crew immediately donned life jackets and never advised the passengers to do so.

Neither Dr. Tuller nor any member of the Flight Crew was hurt (JA 243a, 247a, 300a, 301a, 333a, 447a, 454a). The radio operator had deliberately failed to fasten his seat belt as required by regulations and was thrown from his seat and away from his duty post while the plane was still in the air. (JA 237a, 292a, 293a).

No distress message was sent either by the radio operator, the pilot or the co-pilot, over either the regular system or the emergency radio (JA 298a, 239a).

The point where the plane rested was a little over one mile from the airport on a direct track from or extension of runway 14 and well within the interior of Ireland (JA 138a).

Dr. Tuller was seated in the rear of the plane. He escaped through a rear window, dropped into the water and climbed on the tail of the plane together with a fellow passenger Ellis (JA 111a). Although the crew was aware of these passengers on the tail, they made their way to shore in the aircraft dinghies (JA 258a, 305a). Tuller and Ellis were left standing on the tail in tidal water for over 4 hours (JA 116a). Finally, when the tide had risen about chest high Tuller lost his hold, slipped off the tail, and immediately disappeared beneath the surface. (JA 116a). His body was recovered several days later (JA 34a). The Petitioners admitted that the crash caused his death. (JA 357a).

Although the aircraft was owned and operated by KLM, SABENA had undertaken by contract to conduct flight watching and dispatching of KLM aircraft at Shannon Airport. SABENA's duties included preparation of the flight plan, which provided for periodic position check points on the aircraft track beginning at take off, then at the Kilkee marker (9 minutes away) and continuing at approximately 40 to 60 minute intervals thereafter; (Ex. 13) keeping track of the movement and whereabouts of the aircraft; advising KLM's local Operational Representative, Irish Airlines, "as soon as possible" of any "probable" or known interruptions; maintaining contact with the flight and in the event of an emergency, "taking action necessary for the safety of the flight." (JA 441a-442a).

To assist in this work SABENA had in its office a radio for monitoring messages between KLM's aircraft and the tower (JA 34a-Item 31). It was the established custom and practice that a radio communication or message was not considered complete until the same was specifically acknowledged by the recipient. (JA 161a, 103a, 188a).

As PKY became airborne, the tower transmitted to the aircraft its take-off time of 2:38. However, since this transmission was never acknowledged, the message was incomplete. The SABENA monitor was shut down immediately upon the transmission of the take-off time from the tower to the aircraft and before the message was completed (JA 188a, 34a). By switching off the radio before the message was completed, SABENA placed itself in a position where it could not become aware of such probable flight interruption. The time-off call from the tower is normally acknowledged by the aircraft and such acknowledgment is required to complete the message (JA 231a, 232a, 75a). The reason for this practice in radio communication is obvious. SABENA deliberately shut off its monitor at the critical take-off phase. There was no message or other transmission monitored or received by SABENA in spite of the position check points on the flight plan above noted.

SABENA's chief Dispatcher, Cousins, left his office shortly after the take-off and did not return until 3:45. While he was away his office was advised that PKY had not made contact since its takeoff (JA 35a, 161a). KLM's Flight Operational Representative at Shannon was not advised of the flight interruption or probable flight interruption until 4:40 o'clock—2 hours after

the accident (JA 511a, 521a). At about 5:00 a.m. a rescue launch put out from Foynes a few miles away (JA 521a, 556a). Just as it arrived in the vicinity of the aircraft Dr. Tuller slipped off the tail (JA 116a) and immediately disappeared from sight.

Dr. Tuller was 35 years of age at the time of his death. He was in good health and had a stipulated life expectancy of 36½ years. He was survived by his wife aged 33 and 2 children aged 4 and 8 respectively. He had graduated from Massachusetts Institute of Technology, specializing in electronics, from which institution he later received M.S. and Ph.D. degrees. At the time of his death he was Vice President in charge of Engineering of Melpar, a division of Westinghouse Airbrake and during the last year of his life had a salary of approximately $27,000.00 per annum. He had been with Melpar practically from the time of his graduation. The evidence shows that Dr. Tuller had already achieved a place of eminence in his profession at this early age (JA 183a-203a; 364a-373a) and had a reasonable expectancy of a substantial increase in his future earnings.

SUMMARY OF ARGUMENT

The Court of Appeals was not asked to and did not decide a question involving the Construction of the Warsaw Convention, nor did it equate negligence with wilful misconduct.

The District Court did not depart from the accepted and usual course of judicial proceedings.

REASONS FOR DENYING THE APPLICATION

I.

THE COURT OF APPEALS WAS NOT ASKED TO AND DID NOT DECIDE A QUESTION INVOLVING THE CONSTRUCTION OF THE WARSAW CONVENTION

The Trial Court in its charge defined wilful misconduct as follows: (JA 640a)

> "Willful misconduct is the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or it may be the intentional performance of an act in some manner as to imply reckless disregard of the consequences of its performance; and likewise, it also means the intentional omission of some act with knowledge that such omission or failure to act will probably result in damage or in injury, or the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequences of the omission."

The jury was instructed that in order that the verdict exceed $8,300.00 the jury must find that the defendants had been guilty of such wilful misconduct. No exception was taken to this charge and indeed none could properly have been taken.

Neither party here contends that the law as applied in the charge was error. This Court can do no more than accept for the purposes of this case what both parties agree to be the accepted interpretation of the Convention.

The Court of Appeals agreed (Pet. App. p. 43) that "there was sufficient evidence from which a jury could reasonably find that" each defendant "was guilty of

wilful misconduct, as that term has been interpreted . . ."

II.

THE COURT OF APPEALS DID NOT EQUATE NEGLIGENCE WITH WILFUL MISCONDUCT

After having determined that wilful misconduct was present, the Court of Appeals then considered the question of proximate cause. It said that "as to each category of wilful misconduct the negligence in question contributed proximately to Tuller's death." (Pet. App. 43). This statement did not indicate any intention to equate "negligence" with "wilful misconduct" but merely used the term in a restricted and descriptive sense within the stated frame of reference, i.e. wilful misconduct.

The Court could just as well have said, "as to each category of wilful misconduct the act in question contributed to Tuller's death." The fact that the "act" may have been characterized as "negligence . . . in its discussion of proximate cause does not change the essential finding of "wilful misconduct", the Court having held all of the required elements to be present. Of course it may be noted that the same rule of proximate cause would apply to wilful misconduct as to negligence.

Accordingly points II and III of Petitioners' brief which are erected on the false premise of "equating" and consequent lack of uniformity, fall for this as well as for the general reasons given in this brief. It follows that Petitioners' lengthy discourse on the meaning of wilful misconduct, can best be characterized as another instance of the technique of erecting a straw man so that he can be knocked down.

III.

THE DISTRICT COURT DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The Court of Appeals below was not asked by either party to redefine "wilful misconduct" as used in the convention. Nor did it attempt to do so. As defined in the charge to the jury it was clear and accepted by all parties. The defendant merely argued that the acts complained of by the plaintiff did not fit the definition, and the plaintiff argued that the evidence on the subject was sufficient to take the issue to the jury.

According to the definition of "wilful misconduct", as defined below and as accepted by the parties, three things must coincide (1) an act or omission, (2) done or omitted intentionally, and (3) done or omitted in a manner from which can be implied a reckless disregard of probable consequences.

The first element of wilful misconduct is susceptible of positive proof: the doing or omission of an act. But the second and third elements require a determination of the state of mind of the actor. The state of mind can only be inferred from proof of all the surrounding circumstances. A determination on these issues, like intent in a criminal case, is peculiarly within the province of the jury.

However, petitioners' theme which does not challenge the essential facts is that the jury may not draw an inference of "wilful misconduct" from the nature of the act or of the omission and from the surrounding circumstances. This argument is contrary to the organic concept of Trial by Jury. The unquestioned function of a jury is to draw inferences from facts.

It is well settled that the Jury's verdict on such an issue of fact was a final determination, not subject to review, where the evidence was of such a character "that intelligent persons may honestly differ as to what was actually proved." (*Friedman* v. *Decatur Corp.* 135 F. 2d 812, 816 (D.C. Cir.)

The character of the acts of commission or omission could best be determined by the particular circumstances under which they were committed and the background of the actor; *e.g.*, the most critical phases of air operation are take-offs and landings; during take-off the crew must be mentally prepared to anticipate a failure or an emergency and be physically kept, by means of seat belts, in a position to act; the careful training of the crew to meet emergencies during take-off; the crew's knowledge of the location, purpose of and the handling of all equipment designed for emergency use (JA 75a, 227a, 64a, 83a, 84a); none of the Flight Crew of 7 men were hurt in the crash and all escaped (JA 323a); the plane came to rest practically intact (JA 123a); the plane was not sinking (JA 247a); there was no fire or other occasion for undue haste (JA 110a, 247a); regulations and manuals relating to crew duties in emergencies. All of these considered, together with the series of specific acts and omissions leading to the death of Tuller were ample evidence from which the Jury could find that the acts or omissions were done or omitted deliberately and in a manner from which could be implied reckless disregard of the probable consequences.

There is no dispute on the first element of "Wilful misconduct," viz., the act or omission. Each incident mentioned was proven and not denied. The evidence amply supports the inferences drawn by the jury of

intention and recklessness, as will now be shown. Petitioners' real dispute is that they would not have drawn the same inferences from the facts as the jury did.

A. As to the Failure of the Radio Operator to Fasten His Seat Belt and to Send a Distress Message

As Oudshoorn testified (JA 281a, 282a):

> "Q. Did every member of the flight crew have a seat with a seat belt? A. That's right.
>
> "Q. What is the purpose of seat belts? A. Well, in case of an accident, or in sudden stop or acceleration, that you are not thrown out of your chair.
>
> "Q. And you can continue your duties? A. That's right.
>
> "Q. If you are not thrown out of your chair? A. That's right.
>
> "Q. Is there any regulation requiring that these seat belts be fastened at any particular time? A. Yes, during take off and landing they are supposed to be fastened.
>
> "Q. When you say 'during take off,' how much time does that encompass during take off? A. Well, that means from when you start off blocks until the Captain gives the command to switch off the sign 'Fasten seat belts'."

Oudshoorn, the Flight Radio Operator (JA 275a) was seated at a desk in the cockpit area during the critical take-off phase of the flight. On his desk was a radio transmitter for his use, tuned to the frequency of the Shannon tower (JA 278a, 290a). As was testified by Captain Ten Duis, Chief Pilot of Crew Training of KLM (JA 63a), it is required that there "be a conscious anticipation prior to take-off of possible failure" (JA 75a).

It would have taken Oudshoorn as long to send a distress message as it would take to say the words "King Yoke Mayday" (JA 272a, 278a, 299a). KLM's own operation manual required that a distress message be sent as soon as an emergency arose even if a crash is uncertain (JA 437a, 438a):

> "Surface stations and ships should be informed of the existence of an emergency as soon as it arises. This should be done even if it is not certain that the airplane will have to be ditched. It is easy enough to cancel the call after the emergency is over."

This emergency arose while the plane was still in the air and before it had struck the water (JA 237a, 292a, 293a). Oudshoorn was conscious of the fact that the plane was falling. He expected a crash (JA 293a). Then why didn't he send the message (JA 298a)? The reason is clear. When the plane buffeted and stalled he was thrown out of his seat and away from his desk and mike (JA 296a). This happened because he had not fastened his seat belt (JA 292a, 293a). If his belt had been fastened he would have remained seated and in a position to continue his duties. Other crew members had their belts fastened and remained seated, and had other take-off duties to perform. (JA 243a, 293a). But before Oudshoorn got back to his post the plane was in the water, and no message was sent, although the electric power remained on (1) after a series of shudders in the air, (2) while the plane was in descent, (3) after the plane had come to rest and (4) long enough for Ellis to unstrap his belt have a brief conversation with his wife, get out of his seat and go part way up the aisle (JA 110a, 111a).

This failure to send a message "as soon as" the emergency arose was directly attributable to his failure to hitch his seat belt. If the message had gone out the airplane would have been quickly located at the foot of runway 14 (it was right in the take-off track), the rescue launch would have picked up Dr. Tuller hours before he finally slipped and disappeared.

The company regulations required that seat belts be fastened so that crew members would not be thrown from their seats and could continue their duties (JA 281a). Moreover, the Irish Air Order provided (Ex. 24a, p. 27):

> "that before the commencement of a flight and before each landing of the aircraft, and in conditions of turbulent air such that the precaution is considered necessary, all safety belts and safety harnesses are correctly fastened and that passengers are made aware of the method of operation;"

Oudshoorn stated that he had no reason for not fastening his belt (JA 293a). When asked if he had any reason he answered; "No. I couldn't say yes," obviously meaning that if he answered "Yes" it would not be the truth. His failure to do so was deliberate. Certainly the jury was justified in so finding. Since the only function of a seat belt was to keep the Radio Operator in his seat, a probable consequence of a failure to fasten his belt was that he would be thrown from his seat in an emergency and away from his post of duty. And that is exactly what happened.

B. As to the Failure of Pilot or Co-Pilot to Send a Distress Message

Neither the pilot nor the co-pilot were thrown from their seats (JA 293a). Each was equipped with a

microphone connected to a radio transmitter tuned to the tower frequency (JA 356a). Notwithstanding a company regulation to send a message as soon as an emergency arose no attempt was made to do so (JA 239a). The defendants say it was useless to try after the engineer had thrown the main switch. But that simply is not so. These radios continue to operate after the switch is thrown and as long as the batteries have life (JA 337a). As a further excuse the defendants say that the batteries went dead as soon as they were flooded with salt water. But the evidence shows that the batteries could not have been immediately flooded. The batteries were located in the top of the nose wheel well (JA 338a, 459a). The nose wheel was up and the well doors closed before the plane hit water (JA 241a, 458a). Moreover, the batteries themselves have a protective covering (JA 460a, 461a). Under such conditions it was "a reckless disregard" for the pilot and co-pilot both to assume that the radio would not work. They made no attempt to send a distress message. Such a message would have led to the quick discovery of the plane lying a short distance away and on track off runway 14.

C. As to Failure to Use Emergency Radio and Portable Oxygen Equipment

The aircraft carried a portable emergency radio transmitter designed for the very situation that arose here. This transmitter was small, self-contained and generated its own power by means of an attached crank. When the crank is turned an SOS signal is automatically sent out. This instrument had a range more than adequate for the occasion (JA 276a). It appeared, however, that this emergency radio was carried aft by the main door of the passenger cabin. Dur-

ing an emergency of this type it was one of the radio officer's duties to take this transmitter with him before leaving the plane (KLM Manual; JA 49a). Had Oudshoorn performed this duty and picked up the transmitter, rescue would have been effected hours earlier and Tuller would surely have been saved.

Oudshoorn claimed that after the plane had come to rest, it was not possible for him to pick up this equipment. He said that he could not go back into the cabin because of high water level and gas fumes. But it was demonstrated conclusively that the level of the water in the fuselage could not have kept him from picking up this equipment. The water level could not have been above his knees. Ellis testified that the water level was 4 or 5 feet below the window in the rear of the cabin (JA 111a). Second Officer Webbink testified that no water came into his compartment or the cockpit (JA 492a). The tide was ebbing at the time (Ex. 23, JA 407a). Co-pilot Parfitt was quite positive that, except for the presence of gas fumes, he could have gone all the way back (JA 263a).

But the presence of gas fumes was no obstacle since the portable oxygen equipment and full face masks were available in the cockpit (JA 222a). By the use of this equipment the radio transmitter could have been picked up with relative ease (JA 223a, 283a). These crew members had been trained in the use of this equipment, which protected them from these fumes. Before each take-off the location of all emergency equipment was checked by the crew. (JA 279a). Captain Ten Duis testified that the crew was trained in the use of oxygen and the masks under conditions where there was "lack of oxygen" and "noxious fumes" (JA 66a, 67a). This portable equipment was

easily carried on the back by means of straps leaving the hands free (JA 290a).

Under these circumstances the Jury (not the Court) had the function of determining whether or not this omission was deliberate and in reckless disregard of probable consequences.

D. As to the Handling of the Life Rafts and Abandonment of Tuller on the Tail of the Plane

The emergency life rafts or dinghies were not used to rescue Tuller from the tail. The dinghies were of large size, having the capacity for 20 people. (JA 57a). The last dinghy left half empty (JA 321a). There was no fire or immediate peril. Co-pilot Parfitt testified that there was plenty of time (JA 247a). The plane was stuck in the mud in water just off the end of the runway, in conditions of changing tides. The crew also had portable flash lights. The crew had long ropes (JA 321a). The crew wore life jackets (JA 302a, 482a). Although the crew heard the shouts for help and knew that some passengers were stranded outside on the tail of the wreck, they set out for shore and left Tuller clinging to the tail in the darkness (JA 304a).

The crew was familiar with the uses and limitations of the dinghies. In fact one of the dinghies had been maneuvered from around the wing nearer to the nose exit door of the aircraft by means of a tow-line which was attached to the dinghy (JA 471a). This was a 49 foot tow line (JA 408a). It would have been a simple matter to maneuver the dinghy by means of the line—either to drift it or to lead it (JA 65a, 89a). There was plenty of emergency line immediately at hand if needed (JA 321a). The dinghy could have

also been guided the few feet by means of the lines or towed to the tail by one of the crew swimming and pulling the line. In fact this had actually been done by crewman Webbink, in earlier maneuvering of the dinghy around to the nose exit (JA 308a).

Although these dinghies were primarily flotation devices they could thus be maneuvered by means of a line. They could not be maneuvered by means of the paddles and the crew knew this when they cast the line off and set out for shore (JA 497a).

This was a reckless disregard of the probable consequences of leaving Tuller on the tail in a moving tide and in the dark.

E. As to Failure to Advise Tuller and the Passengers of Location and Manner of Use of Life Vests

The passengers were never advised of the location of the life jackets, either at Amsterdam or Shannon. They were not instructed in the manner of putting them on (JA 109a, 120a, 132a). This was stated affirmatively by Ellis, who had also boarded in Amsterdam and who was seated immediately behind Dr. Tuller (JA 109a), and not denied by any crew member. Ellis also stated that he did not know where the life jackets were kept (JA 120a, 183a).

Here was a take-off at night over a body of water lying at the immediate end of the runway. Take-offs and landings are the most critical phases of any flight. That is where trouble mainly develops, even in the absence of a regulation on the subject, common sense dictated that under such circumstances the passengers be "shown before the critical take-off" the location of life vests. Even if the rather lengthy booklet (Deft.

Ex. 1) had been in the seat pocket (and there was no positive evidence of this (JA 482a, 510a)) and had been found and read through by the passengers, this would have been of little help, if any. This exhibit stated that the vests were located in any one of three places on board (JA 479a). The instructions for their use were not easy to interpret (JA 476a-480a). The defendant offered no company regulation that required the stewards to demonstrate the use of life vests, or even to call attention to the existence of the booklet, and no such instructions were contained in the manuals marked as exhibits. Although the testimony of Ellis was positive on this subject, the appellants did not attempt to prove by any member of the crew that any instruction on the subject was given to the passengers.

Neither party requested the Court to interpret the Irish Regulation for the jury and as observed by the Court below "The applicability of the order was a fair subject of comment in argument." The Regulation provided that the passengers must be:

> "* * * shown *before take-off*, or before reaching thirty minutes flying distance *from* the nearest shore the position of life belts * * * and the method of their operation." (emphasis supplied)

Petitioners argue that compliance with the Irish Order required only that the passengers be informed of the location and use of the life jackets prior to the expiration of 30 minutes of flight over water. 30 minutes would place this plane approximately 150 miles out at sea. The appellants would distort the obvious safety purpose of the Irish Air Navigation Order, having in mind that the take-off from Shannon was im-

mediately over water and would have been far over the Atlantic Ocean in 9 minutes. The flight had originated at Amsterdam and had flown over the North Sea and the Irish Sea.

The failures in this category, as the Court below observed, were also deliberate violations of the fundamental rule for passenger safety applying to transportation on the water, or over the water, and constituted a "conscious and wilful omission to perform a positive duty and constituted reckless disregard of the consequences." The probable and obvious effect of such failure was that in case of an involuntary landing on water the passengers would be without the assistance of life vests. The probable consequence of a passenger being dumped fully clothed in the water without a life vest are, and in this case certainly were, serious. Crew members realized the need for life vests for themselves and promptly put them on (JA 482a).

The jury was thus justified in finding that there was a deliberate omission made in a manner from which can be implied a reckless disregard of probable consequences.

It is clear from the above that Petitioners' reference now for the first time to some immaterial passages in the Chicago Convention is another transparent attempt to drag in a synthetic "treaty question" and create a spurious and irrelevant issue for this Court.

As to proximate cause; the proof shows that Dr. Tuller was in good health (JA 367a); that he had not been hurt in the crash (JA 33a—Item 21); that after standing on the tail of the plane for over four hours, with water rising up to his chest, he slipped off the tail and immediately sank; and that the rescue launch

was pulling up to take him off when this happened. The fact that no instructions as to the life vests were given, and that Tuller immediately disappeared from sight under water is more than sufficient to sustain a finding that Tuller wore no life vest.

The fact that Tuller met his death as a result of the crash is admitted. The record is silent as to the immediate cause of death. A death certificate was proffered by plaintiff and objected to by defendants on the specific ground that it was not probative of cause of death. This proffer was withdrawn and no concession was made on the subject. (JA 357a). There was however, positive proof that Tuller was alive up to the very moment that he slipped into the water (Ellis JA 116a). Obviously a life jacket worn around his chest and shoulders would have kept him afloat and alive. The jury was carefully instructed on the necessity of finding a proximate cause of the death of Tuller and its conclusion that proximate cause existed was amply supported by these facts.

F. As to SABENA's Acts and Omissions as KLM's Agent

SABENA had been employed by KLM to conduct flight watching and dispatching at Shannon. Among other things flight watching consisted of (as prescribed in their Contract):

> "Maintaining contact with all flights within its area of responsibility" (JA 441a)
>
> "In the event of an emergency, take action necessary for the safety of the flight" (JA 442a)
>
> "Report complete facts of any accident" to KLM's Operations Department (JA 442a)
>
> "Ensure that probable or known interruptions to schedules for flight operational reasons * * * are

> given as soon as possible to the operation representative designated by the Carrier." (emphasis supplied) (JA 442a)

The sworn response of SABENA to Interrogatory No. 3 stated that its services included:

> "Prepare flight analysis, assist in preparing a flight plan, * * *" (JA 60a)

Its response to Interrogatory No. 4 as to its services included:

> "* * * noting advanced or retarded progress as compared with flight plan and inform the Operational Representative, designated by the Carrier."
>
> "* * * In the event of an emergency, take action necessary for the safety of the flight, being guided by the instructions in the relevant Operations Manual of the Carrier and the supplementary instructions of the Carrier." * * *
>
> "Ensure that the Operational Representative designated by the Carrier and responsible for ground handling of Carrier's aircraft is kept completely informed as to the movements of the aircraft." (JA 60a-61a)

The deposition of Cousins was to the same effect (JA 153a), and so was the deposition of Mr. Hemblenne, another SABENA employee (JA 142a). Cousins testified as follows:

> "Q. What do your watch duties include? A. We are responsible for what is called operational flight watch, and that means noting whether a flight is advanced or retarded as compared with its flight plan, and also noting the fuel remaining as reported by the aircraft; and in certain cases

sending suggested reclearances or diversion advice to the aircraft.

"Q. Are your dispatching instructions contained in any writing or manual? A. There are instructions in this Sabena manual, and also in other manuals, which we have to comply with or observe in carrying out our duties.

"Q. What other manuals are you referring to? A. The manuals of the Irish Government Services, and ICAO regulations and other company—the manuals of other companies, for whom we are acting.

"Q. Such as KLM? A. Yes." (JA 153a-154a)

As Cousins stated KLM is "running an airline, they want to know where the airplanes are," (JA 186a).

The area of SABENA's responsibility extended from the Western Coast of England to thirty degrees west. (JA 441a). The operations representative designated by KLM was the Irish Air Lines (JA 520a).

SABENA had an office at Shannon for this purpose. This office was in the same building as the tower and the office of the Irish Air Lines (JA 552a, 154a). SABENA maintained a radio in this office for monitoring messages to and from KLM's planes in flight (JA 34a, Item 31). Mr. Cousins, SABENA's Chief Dispatcher (JA 152a), was in charge in SABENA's office on this occasion (JA 35a, Item 33).

SABENA maintained a log in which it made entries noting the dispatch and movement of the aircraft for which it was responsible. (Cousins JA 157a et seq.).

Immediately after this plane took off the monitoring radio was switched off in the middle of the take-off message from the Tower, i.e. before the plane had ac-

knowledged receipt of take-off time (JA 188a, 101a, 103a) and Mr. Cousins did not hear the Tower calling the plane for an acknowledgment (JA 188a). The message from the Tower was repeated six times, one right after the other (JA 34a Item 29). The tower take-off message was never completed (JA 75a, Parfitt 281, 232). The plane did not respond (JA 34a, Item 30). This was most unusual (JA 75a, 233a) and indicated a probable flight interruption. In fact, at that very moment the plane was down in the water. By switching off the radio before the message was completed, SABENA placed itself in a position where it could not become aware of such probable flight interruption. It was testified by Captain Ten Duis (JA 75a), Co-pilot Parfitt (JA 231a-232a) and Radio Operator Oudshoorn (JA 291a) that time-off call from the tower is normally acknowledged by the aircraft and that such acknowledgment is required to complete the message. The reason for this practice in radio communication is obvious. SABENA deliberately shut off its monitor at the critical take-off phase. If SABENA had done what it was required to do, to maintain its operational flight watch, it would have known immediately that something was wrong, and if it had checked along the the track of the take-off or requested or reported the fact to the operational representative, Irish Airlines, who could easily have done this, PKY would have been immediately discovered lying just off the end of the runway. The obvious procedure in this take-off emergency would have been to follow the take-off track from runway 14 and the prescribed take-off pattern.

At 3:25, 48 minutes after take-off, SABENA's office did learn that the plane had not made contact since

take-off. The receipt of this information was entered in the SABENA log (JA 35a, 161a). This message certainly told SABENA that there had been a probable flight interruption. However, Cousins had stepped out of the office when this information came and did not return until 3:45, (JA 35a, Item 33) twenty minutes later. He went out without waiting to determine whether or not this plane which he had just dispatched had gotten off safely. At 3:25, if not before, it was his duty to advise the Irish Air Lines of such probable flight interruption.

When he returned to his office he did not look in the log and no one called his attention to the entry made at 3:25. It was not until 4:10 or 4:15 that he first learned that the plane had not made contact (JA 168a, 169a). Neither Mr. Melling, KLM's local manager, nor the Irish Air Lines was advised of this fact until 4:40, over two hours after the take-off (JA 511a, 521a).

The switching off of the radio immediately after take-off, in the middle of the take-off message, was a deliberate act. Mr. Cousins leaving his office before having been assured of a safe take-off was a deliberate act. The failure to advise Irish Air Lines of a probable flight interruption at 2:38 or at least by 3:25 were deliberate omissions. A probable consequence of these deliberate acts and omissions was that the Irish Air Lines would be delayed getting on the job in case of emergency.

The Irish Air Lines first heard of the lack of contact at 4:40—two hours after they would have heard, had SABENA been on the job (JA 521a). At 4:45 those on shore determined that the plane had crashed (JA 556a). The rescue launch was dispatched about 5:00 o'clock (JA 521a, 556a).

From this sequence of events the Jury was justified in making a determination that had SABENA performed its duty the wreck would have been discovered sooner and Dr. Tuller safely rescued.

The omissions of SABENA and its reckless disregard of the consequences are underlined when it is considered that just a few minutes out of an available two hours would have made the difference of life and death to Tuller.

G. As to the Oudshoorn Statement

Oudshoorn was the Radio Operator on this flight. He was continuously employed by KLM as Radio Operator until July 1958 (JA 274a). On the day of the crash, as such Radio Operator, he made a written statement (Ex. 19) to the Irish Authorities (JA 315a). This statement was made in compliance with the Irish order (Ex. 24A), which required prompt report of all accidents resulting in deaths or injury. The statement was made in the presence of a KLM official (JA 315a).

One of the issues in the action concerned the failure of the operator to send a distress message as soon as trouble developed. The radio operator had testified that he did not send a message, claiming there was insufficient time to do so between the first indication of trouble and the throwing of the electrical switch by the engineer (JA 298a, 301a). He was then shown the statement (JA 315a). He identified the statement and admitted that he had made it. In this statement he gave as his reason for not sending a message, not the lack of time, but the fact that he was thinking of something else, "his skin", and was not thinking of the need for sending a distress message. As the Court below said: (Pet. App. pp. 45-46)

> "The challenged statement must be viewed as an important piece of substantive evidence on the issue of wilful misconduct. As such it discloses an awareness of the existing risks and had a direct bearing on whether there was reckless disregard of the dangers to which the plane and its passengers were exposed."

The statement was relevant and competent as original evidence, not merely as a contradiction, upon four separate grounds, each independent of the other:

(1) As a Statement Naturally Made in the Course of An Agency and Adverse to Interest

Oudshoorn was KLM's radio operator. He also kept the radio log. The portion of the statement which was received and read to the jury related, pointedly, to his duties and behavior as such radio operator. He continued on as KLM's radio operator after the accident and was so employed when he made the statement. The statement made by him a short time after the incident and which concerned the performance or non-performance of his duties as radio operator was "naturally made in the course of the agency" and, therefore, admissible in an action against his principal.

See opinion of Augustus N. Hand, C. J. in *Slifka* v. *Johnson*, 161 F. 2d 467, 469 (2d Cir. Cert. denied, 332 U.S. 758; and comment thereon in 47 Columbia Law Rev. 1228. *Whitaker* v. *Keogh*, 144 Neb. 790, 14 N.W. 2nd 596; *Grayson* v. *Williams* (C.A. 10), 256 Fed. 2d 61; 4 Wigmore on Evidence, Sec. 1078 p. 121 Note 2.

(2) By Imputation

The statement tended to establish a breach of duty by Oudshoorn. The statement would, of course, be relevant as an admission in an action against Oud-

shoorn. On this issue no wrong doing was charged against KLM other than Oudshoorn's wrongful act. If Oudshoorn committed a breach of duty then KLM became liable for the ensuing damages as a matter of law. Since KLM must be liable if Oudshoorn is liable, Oudshoorn's statement is relevant and competent in this action against KLM. See *Grayson* v. *Williams*, 256 F. 2d 61 (10th Cir.).

To the same effect Morris, D. J. in *Martin* v. *Savage Truck Line*, 121 F. Supp. 417, 419 (D.D.C.). It is immaterial that Oudshoorn is not a party defendant here. The evidence which would be admissible against KLM in an action brought against both should be just as relevant and competent in an action against KLM alone. See Richardson on Evidence (8th Edition), § 314. Moreover, the Warsaw Convention expressly provides that the carrier shall be liable for damages caused by a wilful act of an employee (See Convention Article 25 (2)).

(3) As a Memo Made in Regular Course of Business

The statement is a memorandum made in the regular course of business and as such admissible under 28 U.S.C.A. Sec. 1732. KLM was in the business of operating an airline. As a part of this business it was required promptly to notify the authorities of "any accident" which resulted in deaths or injuries (Ex. 24A, p. 33). Implicit in such requirement was the duty to give the authorities all available information regarding the accident. This memorandum was made in the presence of a KLM official and in discharge of that responsibility. As such it is a memorandum made in the regular course of KLM's business. (See *Peklis* v. *TWA*, 187 F. 2d 122 (2d Cir.), cert. denied 341

U.S. 951; *Tausey* v. *TWA*, 97 F. Supp. 458 (D.D.C.), 1951 U.S. Av. 95; *Stewart* v. *Whitney* (N.Y.) 1941 U.S. Av. 24). In each of the cited cases reports or statements made by the defendants' employees regarding an accident to the defendants or to the civil authorities were received in evidence as memoranda made in the regular course of business.

(4) Res Gestae

Neither the District Court nor the Court of Appeals based the admissibility of this statement on *res gestae*. However, the respondent submits that admissibility was also justified on that ground as well.

There has been much confusion in the decided cases on the subject of what does and what does not constitute a part of the res gestae. In later years, however, courts have shown a tendency to liberalize, to apply a practical test rather than a technical one. Formerly the time of the statement with reference to the incident was regarded as all important. Now more regard is paid to the nature of the statement and the mental state of the declarant and less to the time element. Thus a statement made against the interest of the speaker has been regarded as a guaranty of spontaneity. (See *Lane* v. *Pacific Greyhound Lines*, 26 Cal. 2d 575, 160 Pac. 2d 21, *Harris* v. *Allison* (Texas Civ. App.) 11 S.W. 2d 821, rehearing denied 29 S.W. 2d 413).

Summing up the rule, the writer in 53 ALR (2nd) said at p. 1265:

> "In dealing with this time factor, the overwhelming weight of authority is to the effect that remoteness of the statement from the time of the accident will not, of itself, bar admission of the statement, if it can be shown that, despite the re-

> moteness, the statement was spontaneous, having been made without deliberation on the part of the declarant; time, it is held, is not controlling, and the statement need not be strictly contemporaneous with the accident in order to be admissible."

An Appellate Court as well as the Trial Court (JA 314a) may determine whether the circumstances under which the statement was made afforded the adequate degree of spontaneity. (See: *Jackson* v. *Goode*, 49 A. 2d 913 (D.C. Munic. Ct. App.), *Navajo etc. Co.* v. *Mahaffy*, 174 F. 2d 305, 309 (10th Cir.). The wreck was a catastrophic event: Oudshoorn had lived through it. His statement was made to the authorities a few hours after the crash. What he said put him in an unenviable light. Under such circumstances it is reasonable to suppose that when the statement was made he was still "under the influence of the act." In fact the defendants conceded as much at page 41 of their brief in the Court of Appeals; thus: "The statement * * * was no more than a mental reaction at the time it was given."

The statement, admissible for the reasons above stated, was not rendered inadmissible because it tended to contradict the testimony of the witness. A party is always at liberty to prove the true fact by other *competent* evidence even if a witness called by him has testified to the contrary. Here the statement was admissible independently of Oudshoorn's deposition. The harsh thought that a party was bound by a statement of a witness called by him, has long since been shelved.

3 Wigmore (3rd) Sec. 897 (p. 385):

> "The primitive notion that a party is morally bound by the statement of his witness, no longer

finds defenders, although its disappearance is by no means far in the past. In the early 1800s the judges were still engaged in repudiating this false notion on the basis of the rule against impeaching one's own witness.

and Sec. 903 (p. 393)

"On correct principles, then, the use of self-contradictory statements is not forbidden."

H. As to the Pages from the Manual

These pages from the manual defined the duties of the various crew members in the event of certain emergencies. The witness testified that in the event of an involuntary landing on water the crew had been instructed "to try to carry out as many of the instructions for a planned landing" as possible (JA 213a). On this basis the pages were relevant. Moreover, although the landing may not have been a "planned ditching", after the landing the crew was certainly, and in relative calm, preparing to abandon the ship. These instructions and duties related both to ditching and abandonment.

See *Stevens* v. *Boston Elevated Ry. Co.*, 184 Mass. 476, 479, 69 N.E. 338; *Cincinnati St. Ry. Co.* v. *Altemeier*, 60 Ohio St. 10, 19, 53 N.E. 300. *Lake Shore & M. S. R. Co.* v. *Ward*, 135 Ill. 511, 518, 26 N.E. 520.

I. As to Exceptions to the Charge

The District Court did not deny petitioners the right to take exceptions to the charge. The petitioners failed to quote in full the pertinent colloquy between the Court and counsel. We do so now: (JA 647a-648a)

"Mr. Madden: As the charge is in, is it necessary to review our objections or exceptions.

The Court: No.

Mr. Chapman: This willful misconduct, you said on the part of the defendants. I think it should be on the part of the defendants or any one or more of their employees.

The Court: I said they and their agents.

Mr. Chapman: I didn't catch that.

The Court: I said that, That is it.

Mr. Junkerman: Does your Honor wish us at this time to express our exceptions?

The Court: I took this charge up with both counsel, and in the circumstances, there is no exception to the charge. Now, don't tell me that there is.

Mr. Junkerman: There is an additional request to charge.

The Court: I denied that. It is on the record.

Mr. Junkerman: I didn't think it was on the record."

The Court of Appeals found that: (Appendix to Petition p. 51)

> "We are satisfied that appellants had full and uninhibited opportunity to object to the charge concerning the liability of SABENA if they desired but failed to do so. The trial of this cause was long and expensive and the contentions underscore the need for strict compliance with the rule which treats as waived that to which no timely objection is made."

Read in context with the entire charge and the record as a whole there is no error in the charge with respect to SABENA's liability.

Since Sabena was KLM's agent a finding of wilful misconduct against either would warrant a verdict against KLM.

At (JA 640a, 641a) Judge McGuire charged that if the Jury found wilful misconduct on the part of either or both defendants then the Jury must "consider whether such wilful misconduct * * * was the proximate cause of the death."

At (JA 641a) he charged that a finding of wilful misconduct on the part of either or both defendants "will be sufficient to sustain the plaintiffs' claim in that respect."

Then at (JA 641a) he charged that if the Jury should find wilful misconduct on the part of either or both defendants "then you will come to the question of damages."

At (JA 642a) he charged that if the Jury should find wilful misconduct on the part of either or both defendants then the plaintiffs "must show pecuniary or money loss to them."

At (JA 646a) he charged that if the Jury should find wilful misconduct on the part of either or both of the defendants then the plaintiffs' "recovery is governed by the law with respect to damages."

Each of these was a correct statement of law. Obviously the jury understood that wilful misconduct must relate to the defendant against whom they return a verdict. Counsel certainly so understood the charge. This was heavily underscored when, after the jury had been deliberating for many hours, they asked to be reinstructed on certain points. (JA 655a).

In response to this request on the part of the jury all counsel, including Mr. Junkerman, agreed that the Court could read to the jury a certain portion of the charge previously given. (JA 655a). The jury was

then brought in and the agreed portion of the charge was read to them, including the following: (JA 657a)

> "If, however, you should find that the plaintiffs have proven wilful misconduct on the part of the defendants, or either of them, and that such was the proximate cause of the decedent's death, then their recovery is governed by the law with respect to damages, which I have given you, and is not limited to $8,300 or any other figure."

Once again Mr. Junkerman, representing both dedefendants, made no objection nor did he request any clarifying language.

CONCLUSION

Petitioners' application is nothing more than an attempt to divert attention from the point that this case merely involves undisputed facts and the inferences that may be drawn from them by a jury. There are no issues requiring the attention of this Court herein.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 426

KONINKLIJKE LUCHTVAART MAATSCHAPPIJ N.V. KLM ROYAL DUTCH AIRLINES HOLLAND and SOCIETE ANONYME BELGE D'EXPLOITATION DE LA NAVIGATION AERIENNE,

Petitioners,

—against—

GERTRUDE OWEN TULLER, individually and as Executrix under the Will of William Gordon Tuller, deceased, KATHERYN L. TULLER, a minor by GERTRUDE OWEN TULLER, her mother and next friend, and JEAN E. TULLER, a minor by GERTRUDE OWEN TULLER, her mother and next friend,

Respondents.

PETITIONERS' REPLY BRIEF

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IN THE

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Respondents.

PETITIONERS' REPLY BRIEF

Respondents' brief contains flagrant distortions of the evidence. A few illustrations will demonstrate how serious they are.

Respondents, refusing to accept petitioners' statement of the case, taken almost verbatim from the Court of Appeals opinion (App. 32-34, 37), state that the plane took off from Shannon Airport at 2:38 a.m. in "clear, calm weather" (Brief 3). They cite page 33a of the Joint Appendix as authority for

that statement—yet the quoted words do not appear on page 33a. That page consisted of excerpts from a stipulation of facts read into evidence by respondents' counsel. Actually, all witnesses on the subject testified that when the plane passed over the end of the airport boundary it was a pitch black night (JA 121a, 258a).

On the same page 3 of their brief, respondents refer to the fact that "the aircraft carried a portable emergency radio which, upon turning an attached crank, would generate its own power and automatically transmit distress signals * * *." However, they fail to state that this equipment was in a cloakroom near the main cabin door of the plane and that Oudshoorn, their own witness, testified that when he tried to go back into the cabin in an attempt to rescue passengers, the mixture of gasoline and water in that area of the plane was already over his head (JA 331a).

In allegedly describing the accident, respondents make the following statement (Brief 4): "32 to 42 seconds after the aircraft became airborne it made an involuntary landing on the Estuary of the River Shannon (JA 33a), coming to rest on the mud and in a few feet of water. Impact with the water was relatively mild and the plane did not sink. The aircraft did not break apart (JA 123a)." Yet, when we consult their first reference, to wit, JA 33a, we find that the stipulation of facts, entered into in the pretrial proceeding and read into evidence by the same attorneys who wrote respondents' brief, states: "The plane *crashed* approximately 32 to 42 seconds after it became airborne". (Emphasis supplied.) Furthermore, the JA 123a reference does not in any way support the other statements made above that the air-

craft came to rest in a few feet of water and did not break apart. As a matter of fact, Cornelius Bruynesteyn, chief of the Constellation maintenance department of KLM, who went out to the wreckage at 5:00 o'clock in the afternoon of the day of the accident to assist in the removal of bodies, testified to the terrific damage sustained by the plane in the crash. He found that numbers 3 and 4 engines were ripped off the right wing; that the outer wing panel was broken; that number 3 dinghy was completely ripped off the airplane; that serious damage was wrought in other parts of the airplane, including the right wing and the fuselage; and that fuel tanks were broken (JA 448a, 453a). Parfitt, the first officer, also described the gaping holes in the floor and in the roof in the center of the fuselage (JA 256a).

We could point out innumerable similar distortions throughout respondents' brief but space will not permit it and we do not intend to be drawn into a futile discussion of the weight of the evidence. It is not petitioners' intention to reply seriatim to each of respondents' points since most of them have already been covered in the petition. However, a few require emphatic refutation.

If, on page 8 of their brief, respondents intend to convey the impression that petitioners acquiesced in the trial court's interpretation of wilful misconduct, that is entirely incorrect. In motions to dismiss and for directed verdicts at the close of plaintiffs' case and at the close of the entire case, petitioners specified the elements of wilful misconduct which were required to be proven to establish a prima facie case and pointed out that respondents had failed to supply such proof (JA 416a, 571a).

As to Equating Wilful Misconduct With Negligence

At page 9 of their brief, respondents attempt to rewrite the opinion of the Court of Appeals so as to substitute "the acts in question" for the court's use of "the negligence in question" in its holding with respect to proximate cause. However, this is not what the Court of Appeals said (App. 43), and in dealing with rights asserted in reliance upon federal treaty obligations it must be assumed that the Court of Appeals meant what it said. If the Court of Appeals did not intend to equate "negligence" with "wilful misconduct", it is surprising that it did not correct this obvious error when it corrected its original opinion and ordered that the opinion as reprinted be substituted for the first print (R. 697). Article 25 of the Warsaw Convention clearly provides that the carrier shall not be entitled to exclude or limit its liability "if the damage is caused by his wilful misconduct." Here, there has been no holding by the Court of Appeals that the damage was caused by petitioners' wilful misconduct. On the contrary, that court has held only that there was evidence from which a jury could reasonably find that "the negligence in question contributed proximately to Tuller's death" (App. 43). The obvious error of equating "wilful misconduct" with "the negligence in question" cannot be overcome by the simple device of rewriting the court's opinion or imputing to an experienced panel of federal judges, one of whom is a retired justice of this Court, carelessness in expression and draftsmanship.

As to the Question of Life Vests

On page 19 of their brief, respondents state:

> "* * * Although the testimony of Ellis was positive on this subject, the appellants did not attempt to prove by any member of the crew that any instruction on the subject [of life vests] was given to the passengers."

Respondents' counsel are perfectly aware of the fact that when instructions are given to passengers with respect to life vests, such instructions are always given by cabin attendants. All three cabin attendants on board the KLM plane, to wit, the purser, the steward, and the stewardess, died in the crash (JA 501a). The proof of their deaths was vigorously objected to by plaintiffs (JA 498a-501a). Plaintiffs tried to convey to the jury the same erroneous impression that respondents have attempted to convey to this Court (Brief 11, 19), to wit, that *all* of the members of the KLM crew escaped and that, absent testimony to the contrary, petitioners conceded that nothing was said to the passengers about life vests.

Respondents, in their brief, still contend that the Irish regulation was violated, even though the Court of Appeals apparently did not agree with them. The wording of the regulation is much more intelligible when read in full (App. 30), rather than when read with important portions omitted as on page 19 of respondents' brief. It is hard to understand how the Court of Appeals could find the Irish regulation inapplicable (App. 37-38) and still find that the repeated statements of plaintiffs' counsel to the jury that it had been violated "was a fair subject of comment" (App. 43).

As to Oudshoorn's Statement

It is interesting to note that respondents make no attempt to justify the introduction of this statement into evidence upon the grounds stated by the Court of Appeals, but only upon arguments (Brief 27-31) advanced by them under similar headings in their brief in the Court of Appeals. The Court of Appeals apparently rejected such arguments as unsound because (a) Oudshoorn had not been employed by or connected with petitioners in any way for at least eight months prior to the time plaintiffs took his deposition; (b) as plaintiffs' witness they were not permitted to impeach or discredit him; (c) the various rules of law referred to by respondents were not applicable to the facts in this case.

As the Court of Appeals ruled, the statement was not a part of the res gestae. Furthermore, the argument that it was a memorandum made in the regular course of business does not make sense. It was not a memorandum of KLM. If anything, it was one of the records of the Irish investigation committee. The cases cited by respondents to support their argument that the statement was admissible by "imputation" also fail upon analysis. In one case so cited, a statement had been made several hours after the accident by a *party-defendant* to the action, and in the other case the statement was made almost immediately after the accident, the declarant was dead at the time it was received into evidence, and it was against his pecuniary interest when made. Respondents' argument that the statement was made in the course of an

agency is well-answered by Richardson on Evidence (8th edition), Section 329, as follows:

> "* * * But a declaration made by an agent without authority (Taylor v. Commercial Bank, 174 N.Y. 181, 66 N.E. 726, 62 L.R.A. 783), or while not acting in the discharge of his duties as agent (State Bank v. Brocton Fruit Juice Co., 208 N.Y. 492, 102 N.E. 591), or after the agency has terminated is not an admission receivable against the principal. See, also Turner v. Northwestern Mut. Life Ins. Co., 232 N.Y. 171, 133 N.E. 435."

As to the Chicago Convention

Respondents' statement (Brief 20), that petitioners make reference "now for the first time to some immaterial passages in the Chicago Convention," is false. The applicability of the Chicago Convention, and, in particular, Article 11 thereof,[1] was argued extensively and briefed in the district court.[2] Moreover, in their reply brief in the Court of Appeals, petitioners expressly cited Article 11 and argued that the Irish regulation made applicable pursuant to the Chicago Convention had not been violated.[3] The issue

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[1] 61 Stat. 1180, 1183 (App. 28).

[2] The morning session of the trial on November 23, 1959, was devoted exclusively to arguments relating to the KLM-Sabena contract and the applicability of the Irish Air Navigation (Operations) Order pursuant to the provisions of the Chicago Convention.

[3] Appellants' reply brief filed in the Court of Appeals, pp. 9-10:

> "* * * Pursuant to Article 11 of the Chicago Convention (61 Stat. 1180, 1183), an international treaty and therefore part of the supreme law of the land, the Irish laws and regulations relating to the operation of aircraft engaged in international air navigation while within Irish territory were

raised below and the question presented here is not, as respondents would have it appear, a synthetic treaty question, but a real question as to whether a court of a ratifying state can escape the absolute command of Article 11 of the Chicago Convention. Here, the Court of Appeals not only disregarded the mandate of the treaty, but also made a mockery of it by declaring that permissible conduct, performed on Irish territory, in accordance with a national regulation of Ireland and made applicable pursuant to the treaty, constituted "wilful misconduct".

As to the Exceptions to the Charge

Respondents' statement (Brief 34-35) that petitioners' counsel agreed to a portion of the charge wherein the court used the clause "or either of them" in discussing wilful misconduct, is deceptive. The record shows that the case was submitted to the jury on the afternoon of December 2, 1959, and that it was just prior to such submission (the proper time to except [object] according to Rule 51 F.R.C.P.) that defendants' counsel was denied the opportunity to except to the charge. The incident referred to in respondents' brief took place at approximately 3:00 o'clock the following afternoon, to wit, December 3, 1959. At that time defendants' counsel did not agree to the charge or the reinstruction but merely agreed

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the laws and regulations to be applied to the flight involved in this litigation, and the trial court so ruled (JA 436). However, the Irish regulation relied on by appellees did not require notification to passengers of the location and use of life vests in the case of a land plane until 'reaching 30 minutes' flying distance from the nearest shore' (JA 439). Hence, this regulation, read into evidence by plaintiffs, was never violated. * * *"

that the portion of the charge reread to the jury was in fact what the jury had requested to hear (JA 655a-656a). In view of the trial court's explicit refusal to hear defendants' exceptions to the charge before the jury first retired to deliberate (JA 648a), defendants' counsel had no alternative but to obey the court's ruling of the previous day.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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Dated October 24, 1961

JAMES B. MCQUILLAN
Of Counsel